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P. 126. MITFORD CO., LTD., *v.* COAL COMMISSION. Headnote. The contention of the defendants should be stated as contending that the lease granted in 1890 took effect "indirectly" out of the lease granted in 1938.

P. 331. *Re* LUCK. Replace l. 7 by the following: "nationality creating status only requires nationality at the moment of . . ."

P. 461. GORMAN *v.* BARNARD. In explanation of the last sentence of the judgment of SCOTT, L.J., it should be added that, after discussion, it was decided that the plaintiff should have the general costs of the action in the court below on the scale appropriate to a judgment recovering £25, and the defendants were to be entitled to set off the extra costs, if any, incurred in respect of the issue of malicious prosecution.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES *v.* REPRESENTATIVE BODY OF THE CHURCH IN WALES AND TITHE REDEMPTION COMMISSION.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **April 24, 25, 26, 1940.]**

Ecclesiastical Law—Church in Wales—Lay corporation—Duty to repair chancel of parish church—Right of representative body to part of redemption stock—Welsh Church Act, 1914 (c. 91), *ss.* 1, 2, 3, 4, 8, 14, 18, 27, 28—*Welsh Church* (*Temporalities*) *Act,* 1919 (*c.* 65)—*Tithe Act,* 1936 (*c.* 43).

The appellants were the Commissioners of Church Temporalities in Wales, as constituted by the Welsh Church Act, 1914, s. 10, and, as such, were a lay corporation. The first respondents, the Representative Body ofthe Church in Wales, were a body incorporated by Royal Charter, pursuant to the Welsh Church Act, 1914, s. 13. The second respondents, the Tithe Redemption Commission, were created by the Tithe Act, 1936, s. 4. The questions at issue were (i) whether the liability for the repair of the chancel of a certain parish church in the county of Carmarthen formerly attaching to the ownership of a tithe rentcharge which by virtue of the Welsh Church Act, 1914, s. 4, vested in the appellants, and which, by virtue of sect. 8 of that Act, became transferable, but was not actually transferred, to the Carmarthenshire County Council had ceased to attach to the ownership of the rentcharge, and whether the latter had ceased to be subject to the liability for the repair of the chancel, and (ii) whether the first respondents were precluded, by reason of the Welsh Church Acts, 1914, and 1919, from receiving a part of the redemption stock to be issued by the second respondents in respect of the extinguishment of the rentcharge on Oct. 2, 1936, as provided by the Tithe Act, 1936. It was contended that the appellants were lay impropriators by virtue of the provisions of the Welsh Church Act, 1914, s. 28:—

HELD: (i) the appellants were not lay impropriators, and were not liable to repair the chancel of the parish church.

(ii) the first respondents were precluded from receiving a part of the redemption stock payable in respect of the extinguishment of the tithe rentcharge.

Decision of MORTON, J. ([1940] 1 All E.R. 556) *reversed.*

[**EDITORIAL NOTE.** The liability to repair the chancel was before 1936 placed on the owners of the tithe rentcharge. By the Act of 1914, the tithe rentcharge was transferred to the appellants herein, but such transfer was not to be permanent, but merely while certain transitional provisions relating to the disestablishment of the Welsh Church were given effect to. Ultimately, the tithe rentcharge was to be transferred to the county council. It is held that, upon the proper construction of the relevant statutory provisions, the liability to repair the chancel was not transferred to the appellants.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 11, pp. 581, 582, para. 1026; and for Cases, see DIGEST, Vol. 19, p. 307, Nos. 1062-1065.]

Cases referred to:

(1) *Hauxton Parochial Church Council* v. *Stevens*, [1929] P. 240; Digest Supp.

(2) *Wickhambrook Parochial Church Council* v. *Croxford*, [1935] 2 K.B. 417; Digest Supp.; 104 L.J.K.B. 635; 153 L.T. 187.

(3) *Price* v. *Representative Body of the Church in Wales*, [1938] Ch. 434; [1938] 1 All E.R. 351; Digest Supp.; 107 L.J.Ch. 185; 158 L.T. 156.

(4) *Abbott* v. *Middleton, Ricketts* v. *Carpenter* (1858), 7 H.L.Cas. 68; 44 Digest 557, *3735*; 28 L.J.Ch. 110; 33 L.T.O.S. 66; *affg.* (1855), 21 Beav. 143.

(5) *Church Temporalities in Wales Comrs.* v. *Gustard*, [1923] 1 K.B. 640; 38 Digest 503, *583*; 92 L.J.K.B. 349.

(6) *Lanchbury* v. *Bode*, [1898] 2 Ch. 120; 19 Digest 485, *3432*; 67 L.J.Ch. 196; 78 L.T. 14.

Appeal by the plaintiffs from an order of Morton, J., dated Feb. 7, 1940, and reported [1940] 1 All E.R. 556. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

C. S. Rewcastle, K.C., *M. J. L. Beebee* and *R. T. E. Latham* for the appellants.

R. F. Roxburgh, K.C., and *W. S. Wigglesworth* for the first respondents.

H. O. Danckwerts for the second respondents.

Rewcastle, K.C.: The liability for parish church chancel repairs was a very obscure matter at the time when the Welsh Church Act, 1914, was passed. The two authorities on the law are *Hauxton Parochial Church Council* v. *Stevens* (1) and *Wickhambrook Parochial Church Council* v. *Croxford* (2). Sect. 14 of the Act provides that an incumbent is to retain his interest existing at the date of the passing of the Act so long as he holds that office or any other office in the Church in Wales. *Price* v. *Representative Body of the Church in Wales* (3), decided that a clergyman transferred to any other living had to pay over to the representative body the net income of his former living. Among the sums he was allowed to deduct from the gross income, the amount for chancel repairs was not included. It is quite clear that tithe rentcharge was to go to the county councils entirely free of any liability for chancel repairs. Sect. 28 (1) relates to people who had tithe rentcharge as an investment. Parliament, however, could not have intended the appellants to come within the operation of that section. There is only one word in the section which can lend force to any such contention, and that is the word "but." This word, however, may have the meaning of moreover. *Abbott* v. *Middleton* (4) is authority for saying that, if there is a perfectly clear intention, one must not be deflected from giving effect to it by the use of the solitary word "but." Sect. 28 is a saving section, in which one would not expect to find the whole of the Act reversed. One must ascertain the intention of the legislature by looking at the Act as a coherent whole. On the true construction of the 1914

Act, the appellants were never meant to be liable in respect of any chancel repairs. It is unlikely that Parliament would place a temporary body under that liability. There is no difference between compelling the appellants to repair the chancels and compelling the county councils to do so.

Roxburgh, K.C.: There is no difference between the nature of the A liability of a spiritual rector and that of the liability of a lay rector. The liability arises from ownership of the rectorial property. What vested in the commissioners was a reversionary freehold interest. A person who had a reversionary interest only would not have been liable in the ecclesiastical courts. A clergyman who moves from one benefice B to another remains entitled to the income of the first benefice, but he must hand over the net income to the representative body of the church. No deduction, however, may be made in respect of chancel repair liability. The freehold in the rentcharge continues to remain in the incumbent, and his liability continues. The clergyman, however, is entitled to an C indemnity from the representative body. I challenge the argument that at any given moment of time there is a liability upon the incumbent and also upon the Welsh Church Commissioners. There will never be concurrent liability in practice. The words in sect. 28 (1), "Nothing in this Act shall affect the liability," refer to the liability as between the D commissioners and the bodies claiming, and the words "any lay impropriators" include the commissioners, because they became impropriators by virtue of the Act. The statute should be interpreted so as to interfere with existing vested interests as little as possible. Before the Act of 1914 was passed, there was annexed to all tithe rentcharges to which the E Act refers an obligation to repair chancels. The effect of sect. 3 *per se* is to abolish every one of these rights. The effect of sect. 28, however, is to make some restoration, so far as lay impropriators are concerned. The two sections should be read together, and the representative body should not be deprived of their right to have the chancels repaired unless F the Act clearly deprives them of it. There should not be introduced under the word "but" in sect. 28 (1) bodies not specifically mentioned. [Counsel referred to *Wickhambrook Parochial Church Council* v. *Croxford* (2) and *Church Temporalities in Wales Comrs.* v. *Gustard* (5).]

Wigglesworth: The obligation to repair was originally imposed upon G the rector because he had possession of the fund which was set aside for the repair of ecclesiastical buildings. The grants to lay impropriators after the reformation did not relieve lay impropriators from the liability to repair the chancels. The Welsh Church Act, 1914, operates in the same manner. In 1914, the Welsh Church Commissioners acquired H the rectorial property. They acquired it without the cure of souls, but with an obligation to repair. If they transfer the property, the transfer will be subject to the liability to repair, except where the transfer is to a county council under the provisions of the 1914 Act. The object of the Welsh Church Act, 1914, was to impropriate the tithes in the strictest sense. The expression "lay impropriators" includes the Welsh Church

Commissioners. A transferee or an assignee is an impropriator, and the commissioners became impropriators on the transfer of the tithe rentcharges to them. An owner of tithe rentcharge can only be freed from his obligation to repair by the use of express words. [Counsel referred to *Lanchbury* v. *Bode* (6).]

SIR WILFRID GREENE, M.R.: The Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919, effected the disestablishment and partial disendowment of the Welsh Church, the date of disestablishment being Mar. 31, 1920. That was the date which, under the Acts, came to be fixed. I do not propose to read the various sections of the Welsh Church Acts, particularly the Act of 1914, which are relevant to the question which we have to decide. I shall make particular reference to those sections which are more directly in point, but, with regard to the general scheme of the Acts, so far as it is necessary to understand it in connection with the question before us, it can, I think, be summarised without taking up time by reading the sections.

The provisions of the Welsh Church Act, 1914, in regard to property which appertained to the Church in Wales are directed to a distribution of that property in the way mentioned in sect. 8. Broadly speaking, the Welsh Church Commissioners, in whom the property is vested under sect. 4 of the Act, are to transfer that property, as to part, including all churches, to the representative body, as to part to the county councils, and as to part to the University of Wales. The partial disendowment of which I have spoken was effected by the transfer of those last two classes of properties from church ownership to lay bodies for purposes which are set out in the Act, but which do not include the ordinary ecclesiastical purposes to which that property was previously devoted. Among the property which vested in the commissioners was, of course, tithe rentcharge in spiritual ownership. The Act was not concerned with tithe rentcharge in lay ownership. That formed no part of the endowment of the Church in Wales, and it was no part of the object of the Act to affect it in any way. It remained, as it had been since it became impropriate, in lay hands. The tithe rentcharge which was in spiritual ownership at the date of disestablishment was to be transferred to the county councils concerned. There was, no doubt, some tithe rentcharge which fell to be handed over to the representative body—that is to say, a tithe rentcharge which fell under one of the categories of property which was to be transferred to the representative body. I apprehend that there might have been a private benefaction, made, for instance, at some time by a lay impropriator. However, I need not take up time with that, and I refer to that only to show that rentcharges of that character are not things with which we are concerned. The possibility that some such rentcharges did exist appears from the language of the Act of 1919, which in sect. 4 (2) empowers the Welsh Church Commissioners to buy from the representative body any tithe rentcharge transferred to the representative body under the Welsh Church Act, 1914. I apprehend that that refers, for example, to a private benefaction, or something of that kind. Anyhow, we are not concerned with that. The rentcharge with which we are concerned is a rentcharge the ultimate recipient of which is the county council. That is the scheme for the disposal of that part of the property of the Church in Wales which was laicised by these Acts.

So far as the establishment of the Church is concerned, and so far as the application of ecclesiastical law is concerned, sect. 1 provides for disestablishment, and sect. 3 provides that the ecclesiastical law of the Church in Wales shall cease to exist as law. Obviously the matter could not be left there, and, accordingly, there is added a statutory substitute to provide for what I may call the legal structure of the Church, which henceforward is to be based, not on ecclesiastical law, but upon the conception that the various members of the Church in Wales are to be bound *inter se* as if they had mutually agreed, and, with regard to property, it is to be dealt with as though it were held on trust for persons who had so bound themselves.

One of the matters which had to be provided for in the Act, of course, was the matter of existing interests. The Act contains provisions to preserve the existing interests of the existing ecclesiastical personages and bodies, and, in particular, the existing incumbents in the emoluments of the offices enjoyed. Accordingly, the Act of 1914 contains two alternative provisions dealing with the case of persons having an existing interest in tithe rentcharges. Before dealing with that, I should mention sect. 14, which provides that the holder of an ecclesiastical office of freehold tenure, or equivalent to freehold, is to keep his existing interest in the emoluments of his office, so long as he holds that office, or any other ecclesiastical office, in the Church in Wales. An obvious case to which those last words are directed is the case where an incumbent leaves the benefice which he held at the time and goes to another benefice. In those circumstances, the interest which he had in the emoluments of his original benefice is preserved. The Act also provides, in sect. 18, for a commutation scheme which the representative body is at liberty to adopt if it pleases. That scheme provides for commuting the existing interests of the holders of ecclesiastical offices in the Church in Wales in the property which is to be laicised. The Act of 1914 provides that, if that scheme is adopted, the interest of any individual incumbent, if I may take that example, in the emoluments of his benefice, which would include tithe rentcharge where the tithe rentcharge is in spiritual hands, shall be replaced by an annuity, payable to him by the representative body. That commutation scheme, which, under the Act of 1914, was optional, became compulsory under the Act of 1919, and, accordingly, the position was that the incumbent of any given parish received, or became entitled to receive, in lieu of the emoluments attached to his benefice the annuity provided for in the scheme, and ceased to have the

direct interest in those emoluments as such which sect. 14 of the Act of 1914 had preserved to him. Under the commutation scheme, the Welsh Church Commissioners were to pay over to the representative body a calculated sum which was to be equivalent in value to the value of the interests which were to be commuted. That was in fact done, and
we are told that the money was provided—as, indeed, the Act of 1914 A
contemplates that part of it, at any rate, should be provided—out of moneys provided by Parliament, and that the Welsh Church Commissioners have charged in favour of His Majesty's Treasury the property remaining vested in them as security for that loan. The result of that
was, with regard to the particular tithe rentcharge with which we B
are concerned—namely, the tithe rentcharge which the Rev. Samuel Davies, before the Acts came into force, was receiving as spiritual rector of the parish of Llanglydwen—remained vested in the Welsh Church Commissioners. The existing interest of the Rev. Samuel Davies in
that rentcharge had gone (I am speaking now of the time before he died), C
and he became entitled, under sect. 18 of the Act of 1914, to receive the appropriate annuity which would be allowed him by the representative body out of the moneys which the Welsh Church Commissioners paid to them under the commutation scheme. Ultimately the tithe
rentcharge appertaining to this particular parish would fall to be trans- D
ferred to the county council, unless, of course, under the powers of management which the Welsh Church Commissioners have, it had been sold in the meanwhile.

It is important to bear in mind the matters to which I have referred
in approaching the consideration of the specific question which is before E
us. That question relates to the liability to repair the chancel of the parish church of Llanglydwen. Before the passing of the Act, that liability lay upon the incumbent, who was the owner of the tithe rentcharge, which had remained throughout in spiritual hands, and had
never become disassociated from the spiritual rectory. In that capacity, F
he was unquestionably liable to repair the chancel of the parish church. Leaving aside for a moment the operation of the commutation scheme, that particular liability was destroyed by sect. 3 (1) of the Act of 1914. It was a liability existing under ecclesiastical law, and under ecclesi-
astical law alone, so far as Wales was concerned, and, as soon as that G
law ceased to exist as law, the legal obligation which lay upon the incumbent ceased as such to exist. However, there was substituted for it by subsect. (2) what, for brevity, I may call the quasi-contractual obligation enforceable in the temporal courts. Accordingly, if the
matter had stood there, the position of the incumbent on disestablish- H
ment would have been that he would have retained during his life his existing interest in the tithe rentcharge which formed part of the emoluments of his benefice, but, whereas the original liability under ecclesiastical law had gone, he would have been compellable to keep the chancel in repair in the temporal courts under subsect. (2). As matters

turned out, however, the situation was different, because the Rev. Samuel Davies became entitled under the commutation scheme to an annuity calculated in accordance with that scheme in lieu of his previous interest in the property appertaining to the benefice, including the tithe rentcharge, and the obligation to maintain the chancel in repair is imposed upon him by sect. 18 (*g*)—it is imposed upon him as annuitant under the commutation scheme—and, by the joint operation of para. (*g*) and sect. 3 (2), the liability so imposed upon him can be enforced in the temporal courts as though he had contractually bound himself. That was the situation down to Nov. 20, 1922, which was the date upon which the Rev. Samuel Davies died. Throughout that time, as it has so happened, the tithe rentcharge in question, which was vested in the Welsh Church Commissioners under sect. 4 of the Act, has remained vested in them, and, so far as can be foreseen, it will remain vested in them for a considerable time, or, rather, would have remained so vested but for the passing of the Tithe Act, 1936. The result of this is that the ultimate transfer to the county council of the redemption stock substituted for that tithe rentcharge by the Tithe Act, 1936, has been postponed, and will continue to be postponed until the machinery in operation allows the transfer to take place.

The situation consequent upon that state of affairs is, I think, truly that the entire interest in the tithe rentcharge and the redemption annuity has been, and remains, vested in the Welsh Church Commissioners, and will remain so vested until they transfer it to the county council, or to a purchaser, if by any chance it were to be sold. Since the death of the Rev. Samuel Davies, there has been in existence no annuitant under the commutation scheme. The commutation scheme being designed to deal with existing interests, as soon as a person holding such an interest dies, the scheme has served its purpose, so far as his interest is concerned, and drops out of the picture, and, in consequence, there being no annuitant to defray the cost of the repair of the chancel, there arises the question : Has there, since the death of the Rev. Samuel Davies, been anybody under a legal liability to effect those repairs ? I think it fair to say that the Act of 1914 was contemplating that the transfer of tithe rentcharge to county councils in all probability would not be long deferred. The Act contemplated the case where such a transfer would take place during the lifetime of the holder of an existing interest, and it made provision for the way in which the holder of such an interest was to have his financial position, in substance, preserved, notwithstanding that the county council had received a part of the original emoluments of the benefice. It is beyond question that, when a county council has transferred to it tithe rentcharge (or the redemption stock) under the Act, that county council is not subject to any liability for the repair of the chancel of the parish church, and the result is that the original liability which lay upon the spiritual owner of that rentcharge disappears altogether.

To summarise the matter, it would work in this way. Before the Act, the liability was enforceable in the ecclesiastical courts, and after the Act, so long as the existing incumbent held his interest in the tithe rentcharge as such, the liability would have been enforceable in the temporal courts on a quasi-contract. Upon the death of such an incumbent, if the tithe rentcharge had been transferred to the county council in the meanwhile, all liability of every kind in respect of the repair of the chancel would have disappeared, and, if it was desired to keep the chancel in repair, the persons to do it would be the representative body, who, under the Act, became the owners of the churches, and the money necessary to provide for it would have to be found from such funds as they could provide.

The question before us is of this nature. When the Rev. Samuel Davies died, and the commutation annuity which he had received thus came to an end, and with it his liability in respect of repairs, was there a liability, and is there to-day a liability, and will there continue to be a liability, in the Welsh Church Commissioners, as owners of that tithe rentcharge (or the redemption stock), to repair the chancel ? Their position, if I may examine it quite shortly, is, I think, this. I have already said that, in my view, the right to the tithe rentcharge and the redemption stock vested in them, and continues to remain vested in them. The provisions of sect. 3 (1) destroy the obligation which previously attached to the owners of the rentcharge under ecclesiastical law. The substituted quasi-contractual obligations under subsect. (2) are not applicable to the case of the Welsh Church Commissioners as owners of the rentcharge, because they are not members of the Church in Wales. Accordingly, it would appear, if the matter had stopped there, that, in the events which have happened—that is to say, the commutation scheme having become effective, and the tithe rentcharge having vested in the Welsh Church Commissioners freed from the existing interest of the incumbent—the obligation which previously attached in respect of that rentcharge has disappeared, and, indeed, down to this point, one can see no reason why it should not have disappeared. The ultimate transferees, the county council, are to take it free of any such obligation. The existing incumbent, during his life, as recipient of an annuity under the commutation scheme, has imposed upon him the liability to repair, and that liability is enforceable by the proper machinery. I cannot see why, in that state of affairs, the Act should have provided for the survival of a liability in the Welsh Church Commissioners as the persons in whom the tithe rentcharge is vested during this period. The Welsh Church Commissioners are, of course, persons who have no beneficial interest in these matters at all. They are brought into existence merely as a piece of machinery to carry out certain executive functions in connection with what was obviously a very complicated situation, and the property which vests in them does so for the purpose, and for the sole purpose, of enabling that property to be properly administered for the purposes of the Act, and ultimately to be transferred to the persons whom the legislature has decided should receive it.

If one takes, first of all, the period down to the death of the Rev. Samuel Davies, it is said on behalf of the representative body that the true position is that during that period the Rev. Samuel Davies was liable to repair the chancel as the recipient of the annuity under the commutation scheme. It is also said that concurrently with that liability there was a liability upon the Welsh Church Commissioners as the persons in whom the tithe rentcharge was vested. Why the legislature should have gone out of their way to provide for two liabilities of that kind I am at a loss to understand. I am still more at a loss to understand why, if they did so, they should not have provided that the primary liability should fall upon the incumbent. No such provision is to be found, nor can I find any provision under which the Welsh Church Commissioners, if it were attempted to enforce this alleged liability against them, could obtain indemnity from the incumbent. No doubt, if that were the true legal position, that problem might have been solved in practice during the lifetime of the incumbent by the representative body enforcing against him, in the first instance, the liability to repair, but the question we have to decide brings out the point in a practical form, because the incumbent is now dead. It is said that the liability of the commissioners, which has been in existence throughout, is now a sole liability and that the representative body is, accordingly, entitled to call upon the commissioners to execute the repairs in question. As I have said, if the matter merely rested upon sect. 3, in whatever way one regarded the nature of the ownership of the Welsh Church Commissioners, that ownership would not have carried with it any enforceable liability. The liability under ecclesiastical law has gone, and the substituted liability in the temporal courts does not apply to the case. That difficulty, it is said, disappears by force of one section in the Act, and by force of one section only—namely, sect. 28. Sect. 28 provides as follows:

> (1) Nothing in this Act shall affect any liability to pay tithe rentcharge, or the liability of any lay impropriator of any tithe rentcharge to repair any ecclesiastical building, but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under this Act, be liable for the repair of any ecclesiastical building. (2) Such liability as aforesaid of a lay impropriator may be enforced in the temporal courts at the instance of the representative body in like manner as if such liability arose under a covenant made with the representative body and running with the tithe rentcharge.

That provision applies, and applies unquestionably, to the case of a person who, at the date when the Act became effective, was the lay impropriator of tithe rentcharge, and, as tithe rentcharge in such ownership was not to be taken away from its owner by the Act, it was obvious that the liability which attached to it in respect of chancel repairs should remain where it was, or otherwise the Act would have made a present to the lay impropriator for no reason at all. The position with regard to such a lay impropriator, therefore, would appear to be this. He is not affected, of course, by the quasi-contractual scheme in sect. 3 (2), because the property which he holds in his hands is outside the Act altogether, but, in order to ensure that there shall be a readily enforceable liability upon him, subsect. (2) provides for a liability arising under a notional covenant. That, therefore, is the way in which the lay impropriator has imposed upon him a suitable liability in respect of the obligation to repair the chancel of the parish church. It is said that the provisions of sect. 28 are not confined to persons who were lay impropriators at the time when the Act became effective, but that the expression "any lay impropriator" in the section includes the Welsh Church Commissioners. It is essential for the argument of the representative body to be able to establish that proposition, and, if they cannot establish it, any liability to repair the chancel must have gone, so far as the Welsh Church Commissioners are concerned. To that argument there appeared to me to be a solid phalanx of objections. First of all, if the Welsh Church Commissioners are to be properly described as "lay impropriators," it is by this Act, and by this Act alone, that they have acquired that status. The expression "lay impropriator" is a well-known and ancient expression, and, with the corresponding word "impropriate," and the word "appropriate," constituted a terminology suitable to describe the position in an established and endowed Church. One effect of the Welsh Church Acts is to sweep away the whole of the conception of lay impropriators, or spiritual impropriators, of tithe rentcharge. Save in the one case of the existing lay owners of tithe rentcharge, that terminology has no relevance and no suitability to the new state of affairs which these Acts are bringing about. Therefore, it would be very extraordinary if the legislature had used phraseology of that kind as applicable to a body which is brought into existence by the very Act which renders phraseology of that kind completely useless for the future. I say that merely as a preface to the other objections, which appear to me to be quite conclusive.

First of all, subsect. (1) begins with the words: "Nothing in this Act shall affect any liability." In other words, it is framed as a saving clause. If the section were intended to apply to somebody who became a lay impropriator by virtue of the Act itself, and by virtue of the Act alone for the purposes of the Act, I cannot imagine any phraseology less suitable than the words, "Nothing in this Act shall affect any liability," because it is the Act itself which creates the liability in that person. It is the Act itself which clothes that person, according to the argument, with the character of lay impropriator. Indeed, taking the first part of the subsection by itself, apart from the reference to the county council, I should have thought that it was not really open to argument that the phrase "any lay impropriator" in subsect. (1) could not apply to the Welsh Church Commissioners. The whole strength of the argument lies in the fact that the subsection goes on to say:

> . . . but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under this Act, be liable for the repair of any ecclesiastical building.

It is said, and it is a perfectly legitimate argument, that that reference
A to the county council shows that, if the reference had not been there, the county council would have been under such a liability, and, moreover, would have been lay impropriators. If that be not so, it is asked: what is the point of the reference to the county council, and why introduce that reference by the word "but," which, in its ordinary gram-
B matical significance, indicates a qualification of what has gone before—namely, the general reference to lay impropriator? On that basis, it is said, it is impossible to confine the words "any lay impropriator" to persons who were lay impropriators when the Act came into force, that the words must extend to county councils, and that, if they extend
C to county councils, they must extend to the Welsh Church Commissioners. I am not going to suggest that this subsection is artistically drafted. It is quite fair to say that this reference to the county council is one which introduces an element of apparent doubt, but we have to construe the Act as a whole, and we have to construe the section as a
D whole. I have already pointed out that the opening words of the section are completely inappropriate to produce the result suggested. I have pointed out some respects in which the scheme of the Act and the express provisions of the Act are clearly directed to getting rid of this liability altogether and substituting the liability on the annuitant under
E the commutation scheme, so long as he shall be alive. There are certain other matters to which I shall refer presently, all of which seem to me to point in the same direction.

The conclusion to which I have come, and to which I find myself forced to come, on the basis of these considerations, is that the reference
F to the county councils in this subsection is put in—and perhaps in this particular piece of legislation, with its long history of political controversy behind it, it is not surprising to find that somebody should have put it in—*ex abundanti cautela*, in order that in express terms, and in the clearest possible manner, one of the objects to which Welsh dis-
G establishment had always been directed should be clearly and specifically provided for. I say that it does not surprise me to find in this particular piece of legislation that particular provision inserted *ex abundanti cautela*. It is perhaps fair to say that *prima facie* one does not construe the language of an Act of Parliament as inserted *ex abundanti*
H *cautela*, but, if one is compelled so to construe it by the general tenor of the Act and the context, it is perfectly legitimate, and, indeed, necessary, so to construe it. If it be not so construed, there results, as it appears to me, a position of the utmost capriciousness. It so happens that this particular tithe rentcharge (or the redemption stock) has not yet been transferred to the county council. The reason why that

has not been done is because the administration of the Act has taken a long time, and will take a long time yet. However, given the necessary consent of the Treasury, if it be necessary, and given an administrative situation which would enable it to be done, there is nothing to prevent the Welsh Church Commissioners from transferring the redemption stock substituted for this tithe rentcharge to the county council immediately. They might have done it a year ago, if similar circumstances had existed. In that case, the liability would admittedly have disappeared. Why should it be that this tithe rentcharge, which, in the beneficial hands into which it is ultimately to come, is to be exempt from any such liability, should remain under such a liability while it is in purely administrative and executive hands ? The whole question as to whether the representative body could secure the repair of these chancels by means of tithe rentcharge would depend upon what might be a purely fortuitous circumstance—namely, whether or not at any given moment the tithe rentcharge had been transferred to the county council.

However, the matter does not rest there. As I have already said, the argument involves the co-existence of two liabilities so long as the annuitant was alive, the one a liability based on a notional covenant under sect. 28 and the other the liability of the annuitant based on a notional contract between himself and the other members of the Welsh Church under sect. 3 (2), liabilities of a different character based on a different legal conception, with no provision in the Act by which the person under one liability is to have a right to be indemnified by the person under the other liability. I cannot conceive that the legislature would have brought about a situation of that kind.

There are two other points to which I may call attention, and one arises under sect. 27. Under that section, the Welsh Church Commissioners and any local authority have power, with certain consents, to sell, property vested in them by or under this Act. Accordingly, after this tithe rentcharge (or rather the redemption annuity) has been transferred, the county council can, at some future date, if it obtains the necessary consent, sell it to a purchaser. The argument on behalf of the Representative Body is, and must be, that not merely the Welsh Church Commissioners but also the county council are lay impropriators within the meaning of sect. 28, the county council being exempted from the liability which otherwise would have attached to that status by reason of the express provisions in subsect. (1), which exempts them from that liability. When the county council sells to this purchaser tithe rentcharge of which they are lay impropriators, the purchaser himself, when he acquires the tithe rentcharge, is a lay impropriator. He is not exempted by the express exemption in sect. 28 (1), because that is confined to county councils. The curious result follows, therefore, that this liability to repair the chancel remains alive and effective, according to the argument, up to the transfer to the county council, and then goes into retirement during such time as the tithe rentcharge remains vested in the county council, and, as soon as they sell it to the purchaser, it emerges from its retirement in full vigour and effectiveness. Parliament has the right to be capricious, but I must decline to construe the provisions of this Act of Parliament in a way which would produce A caprices of that kind, when I can find a perfectly sensible and perfectly logical, reasonable and convenient method of construing the Act which will not lead to those consequences, but which will produce a harmonious and consistent result.

I may refer to one further point which appears to me to lead in the B same direction. Under sect. 18, which is the commutation section, the Welsh Church Commissioners are under a liability to pay over to the representative body the aggregate value of the existing interests, and, pending payment of that sum, they are to pay interest upon it. Sect. 18 (*d*) empowers the representative body to call upon the Welsh C Church Commissioners to make payments from time to time on account of the sums payable to the representative body; but the limit up to which they can call upon them to make such payments is the amount then received by, or due to, the Welsh Church Commissioners as income from the property vested in them and to be by them transferred to the D University of Wales and the county councils. If this argument be right, and if a request of that character is made to the Welsh Church Commissioners, the latter would be entitled to say: "We have received in respect of income of tithe rentcharge which is to be transferred to the county councils £X, but out of that £X we are liable to repair the E relative chancels throughout Wales. You, the representative body, cannot call upon us to make a payment of the amounts which we have collected in respect of these tithe rentcharges without at the same time allowing us to ensure that we are not paying away to you money which we ought to spend on the repair of the chancels throughout the princi- F pality." There is not a suggestion in para. (*d*) that anything of the kind has to be taken into calculation, and, indeed, if anything of the kind had to be considered, it seems to me that the Welsh Church Commissioners could never be called upon to pay over money under that clause unless they had satisfied themselves as to the state of repair of the G chancels of the churches in the parishes in respect of which the various tithe rentcharges were received. That is only an indication which seems to me to strengthen the view which I have formed, if, indeed, it is required for that purpose. I think that I have explained sufficiently fully the reasons which have caused me to differ from the judgment of MORTON, J. H It is not out of any disrespect for him that I refrain from examining the reasoning which led him to the conclusion to which he came, because my reasons for differing from him sufficiently appear from what I have said.

I conclude these observations by referring to one matter which was very vigorously pressed upon us by counsel for the first respondents, and which, indeed, formed almost the linchpin of his argument. It was said that, if we decide this appeal in the way in which, in my opinion, it ought to be decided, we should by implication be deciding that episcopal and capitular tithe, which apparently—I say apparently, because the matter has not been gone into or argued—goes to the University of Wales, did not carry with it the pre-existing liability in respect of chancel A repairs, and that, accordingly, not merely are the Welsh Church Commissioners now free of any such liability, but, when the University of Wales receives the redemption stock substituted for those tithe rentcharges, it also will be. I do not myself find that it is necessary or helpful to consider what may be the legal position with regard to the episcopal B or capitular tithe. If I found myself forced to consider that matter, before I could justly construe the Act in relation to the particular subject-matter before us, I should, of course, be bound to take it into consideration. However, I do not find anything which compels me to examine, for the purposes of this decision, a matter to which different considera- C tions may well apply, and which is not affected by the particular set of words with which we have here to deal, because what we have to deal with here is the tithe rentcharge which goes with the benefice to the spiritual rector, and we have to construe the section in the light of the reference to the county council which appears in it, a reference which, D of course, has nothing to do with the University of Wales. If and when that question as to the episcopal and capitular tithe comes up for consideration and decision, it must be decided, but it must not be understood from anything I have said that I am expressing any opinion whatsoever upon that subject. In the result, in my opinion, the appeal E succeeds, and the appropriate declarations on that basis must be made.

MACKINNON, L.J.: I agree. The entire structure of the argument for the respondents rests upon the attribution of a particular meaning to the words " any lay impropriator of any tithe rentcharge " in sect. 28. F Obviously those words would come up and designate the ordinary and well-known lay impropriator of tithe rentcharge in existence before the passing of this Act—very likely a college, or possibly a private person. Counsel for the first respondents, however, seeks to say that, in addition to that obvious meaning, the phrase also has the meaning that includes G any person or body who, by virtue of the provisions of this Act, becomes the assignee or transferee of any tithe rentcharge. He was quite logical in asserting that he was entitled to make that addition to the meaning of that phrase, and to carry it to its furthest extent, because, when he was driven to do so, he did not shrink from saying that, if the county H council assigned or sold a tithe rentcharge to an investor, that investor would, in his turn, become a lay impropriator within the meaning of this phrase. To my mind, the radical fallacy of that argument for the respondents is that part of the definition of " lay impropriator " in the section which adds a body or person who, by virtue of the provisions of this Act, becomes the assignee of the tithe rentcharge to the obvious person designated by the section—namely, one who is a lay impropriator of a tithe rentcharge at the date of this Act, and outside its provisions altogether. That being so, it is quite unnecessary for me, after hearing the elaborate judgment of Sir Wilfrid Greene, M.R., to canvass the matter further. I entirely agree that this appeal ought to succeed.

Clauson, L.J.: I agree, and, notwithstanding the importance of this case, I do not feel that any purpose would be served by my repeating an argument which could only be based on the same lines, and which could only reach the same conclusion, as the arguments which have been stated in the judgment of Sir Wilfrid Greene, M.R., and that of MacKinnon, L.J. I accordingly agree that this appeal should be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *R. Primrose* (for the appellants); *Milles, Jennings White & Foster* (for the first respondents); *Official Solicitor to the Ministry of Agriculture* (for the second respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ODHAMS PRESS, LTD. *v.* COOK.

[House of Lords (Viscount Caldecote, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **February 27, 28, May 8, 1940.**]

Income Tax—Deductions—Subsidiary company—Trading account between principal and subsidiary company—Loss of subsidiary company written off trading account—Whether money wholly laid out for trade of principal company—Income Tax Act, 1918 (c. 40), *Sched. D, Cases I and II, r.* 3 (*a*), (*e*), (*f*), (*i*).

The appellant company had a number of wholly controlled subsidiaries, for which it did printing work. One of these companies, C. F., Ltd., during the year 1933-34 made a loss of £2,927 5*s.* 8*d.* upon its trading operations. The charge for printing during that year was £10,118, and the appellant company wrote off £2,927 5*s.* 8*d.* from that sum and contended that that sum of £2,927 5*s.* 8*d.* was a proper deduction against profits. The Crown contended that the sum of £2,927 5*s.* 8*d.* had no specific relation to the sum of £10,118, and that it was in fact capital put into the subsidiary company to support it:—

Held: the sum written off was not wholly and exclusively expended for the purpose of the appellant company's trade, and was not, therefore, an admissible deduction in computing the profits of the appellant company's trade, which was the subject-matter of the assessments.

per Viscount Caldecote, L.C.: the trade or business of one company, even though it may affect very closely the trade or business of another, is not the same as that other's trade or business.

Order of Court of Appeal ([1938] 4 All E.R. 545) *affirmed.*

[EDITORIAL NOTE. In dealing with this case, the House of Lords have dismissed the appeal because the finding of fact in the supplemental case asked for by the Court of Appeal does not amount to a finding that the expense in question was

wholly laid out for the purpose of the trade or business of the appellant company. They hold that this finding is conclusive of the matter.

As to Capital Sums Advanced to Subsidiary Companies, see HALSBURY, Hailsham Edn., Vol. 17, pp. 160, 161, para. 327; and for Cases, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252.]

Appeal from an order of the Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), dated Nov. 23, 1938, and reported [1938] 4 All E.R. 545, affirming an order of Lawrence, J., dated Mar. 25, 1938, and reported [1938] 2 All E.R. 312. The facts are fully set out in the opinions of Viscount Caldecote, L.C., and Viscount Maugham.

J. Millard Tucker, K.C., and *Frederick Grant* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Viscount Caldecote, L.C.: My Lords, this seems to me to be a hopeless appeal. The special commissioner, to whom, by agreement of the parties, the matter was remitted by the Court of Appeal for further findings, arrived at a finding of fact which must be fatal to the appellants unless they can show that there was no evidence to support it. After hearing a very clear argument by counsel for the appellants, I can find no ground for any such suggestion.

The appellants claim to deduct, in making up an account of their profits for the year of assessment, a sum of £2,927 5*s*. 8*d*., either by way of an adjustment reducing the amount received, or to be received, by the appellants on trading account, or as money laid out or expended for the purposes of their trade. The finding of fact by the special commissioner was that this amount, which was written off in an account with another company:

> . . . was not so written off wholly and exclusively for the purpose of the trade or business of the appellants.

The facts stated, either in the original case or in the supplemental case, in my opinion, abundantly justify this finding. The company, off whose indebtedness to the appellants the sum in question was written, was a subsidiary company of the appellants in the sense that the appellants held a controlling interest in it. The appellants, who are printers and publishers, had acquired all the shares in the company, partly in order to secure work for themselves in printing a periodical issued by the company. The original case stated by the special commissioners contained a note of evidence given by the secretary of the appellants that the subsidiary company had formerly made profits, but in recent years had incurred losses. It was hoped that it would again become a going concern. The appellants were, therefore, interested in the subsidiary company both as shareholders who hoped to receive dividends from it to swell their own profits and as printers who did work for it at full trade prices. A director of the appellants said that they were compelled for business reasons to write off losses sustained by their subsidiary companies, and they did this by reducing the amounts which had been charged by the appellants against the subsidiaries for work done on trading account. The amount of the sum written off in the year of assessment in this case was the exact amount of the trading loss of the subsidiary company for the material year.

These facts seem to me to be evidence upon which the special commissioner might reasonably arrive at the conclusion that the sum written off was not so written off wholly and exclusively for the trade or business of the appellants. No doubt it was better for the appellants that their subsidiary companies, and this one amongst them, should prosper, and not be weighed down with debts. The same would be equally true of any company holding shares in another company and having trading relations with it. It is tempting to treat what I have called the subsidiary company as if it were part and parcel of the appellants, but, as SIR WILFRID GREENE, M.R., points out, the two companies are separate taxable persons. The trade or business of one company, even though it may affect very closely the trade or business of another, is not the same as that other's trade or business. Sched. D, Cases I and II, r. 3 (*a*), prohibits the deduction of

> any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade [of the person whose profits or gains are being computed].

The appellants were computing their profits and gains, and it is their trade which is to be regarded. The special commissioner finds, on evidence of which there is abundance, that

> the sum written off was not so written off wholly and exclusively for the purpoes of the trade or business of the appellants.

That is enough to shut out the appellants' right to deduct the amount.

It was suggested, though I think not very strenuously, by the appellants' counsel that r. 3 (*a*) was not germane to the facts of this case, because the writing off of the sum in question was not a disbursement or expense, but was in the nature of a tradesman's discount or rebate. That is not the view of the facts taken by the special commissioners, nor do I think that it is the right view. The sum of £2,927 5*s*. 8*d*. was the exact amount of the trading loss of the subsidiary company for the year in question, and bore no relation whatever to the prices charged by the appellants for the work they had done. I agree entirely with the judgment of SIR WILFRID GREENE, M.R., and, in my opinion, this appeal should be dismissed with costs.

VISCOUNT MAUGHAM: My Lords, in the view of LAWRENCE, J., of the Court of Appeal (SIR WILFRID GREENE, M.R., SCOTT and CLAUSON, L.JJ.), and, I think, of all your Lordships, this appeal turns upon a question of fact. The decision of this question by the commissioners for the special purposes of the Income Tax Acts must stand if there was evidence upon which they could come to the conclusion at which they arrived. Your Lordships, I think, have had no difficulty in agreeing with the judge and with Sir Wilfrid Greene, M.R., and Scott and Clauson, L.JJ., that there was such evidence. In these circumstances, I think that it will be sufficient to state the facts as briefly as possible.

The precise question is whether, upon the facts set out in the case stated by the special commissioners and in the case supplemental thereto, there was evidence upon which the commissioners could hold, as they did, that an amount of £2,927 5*s.* 8*d.* written off by the appellants in an account as between themselves and a certain subsidiary company, Coming Fashions, Ltd., was not money wholly and exclusively laid out or expended for the purpose of the appellants' trade, or, in the alternative (in so far as expended for the purpose of that trade at all), was capital withdrawn from, or employed in, that trade, and, therefore, in either event could not be deducted in computing the profits of the appellants, trade. The Court of Appeal did not think it necessary to deal with the second alternative, and, as your Lordships are content to take the same course, I shall deal with the first alternative only.

The appellants are printers and publishers, and they hold controlling interests in some 16 subsidiary companies which own newspapers or other publications, or are printers, publishers or advertising agents, or carry on similar businesses. In particular, the appellants hold all the shares in Coming Fashions, Ltd., which compiles and issues for sale a periodical called Everywoman's. The appellants publish this periodical for Coming Fashions, Ltd., upon a commercial basis, and from time to time have advanced large sums on loan to that company. In addition to the amounts advanced, the appellants were owed by the company at Dec. 31, 1933, a sum of £10,118 on trading accounts, representing charges for work done at full trade prices. For the trading year ending Dec. 31, 1933, Coming Fashions, Ltd., made a net trading loss of £2,927 5*s.* 8*d.* The appellants wrote off in their own accounts an amount equal to this loss from the amounts due to it by Coming Fashions, Ltd., on trading account. It is this sum so written off that the appellants allege that they are entitled to deduct in computing the profits and gains of their trade for the year ending Dec. 31, 1933. They rely on the Income Tax Act, 1918, Sched. D, Case I. It may be mentioned that a similar question arises under another year of assessment.

It is necessary at this point to state that, in the course of the first hearing before the Court of Appeal, the court made an order remitting the matter to the special commissioners for further findings, with liberty to the parties to call further evidence. In particular, the special commissioners were asked to answer two questions, of which the material one was as follows:

> Whether the sum written off was so written off wholly and exclusively for the purposes of the trade or business of the appellants.

The order directed also that the commissioners should in each case state the facts on which they based their findings. That was done in a supplemental case, and your Lordships have had to consider that document as well as the original special case. It emerges from the earlier document that the sum of £2,927 5*s.* 8*d.* was written off for business reasons, that the debt was not released, but would never be claimed from Coming Fashions, Ltd., that the appellants could not, for business reasons, allow any of their subsidiaries to fall into such a position that it could not pay debts due to other persons, and that they were compelled for business reasons to write off losses sustained by their subsidiaries. In the supplemental case there are to be found some findings which I think do little more than confirm the above. The following are the most material for the present purpose:

> The commercial community who have dealings with appellants do not generally distinguish between appellants and any of its subsidiaries, and they would so far regard Coming Fashions, Ltd., as being a part of appellants' business as to attribute to appellants any discredit resulting if Coming Fashions, Ltd., were to default to its creditors.
>
> If the accounts of Coming Fashions, Ltd., for any year showed a deficit, appellants would come to the relief of the subsidiary company by making such adjustment in the accounts between the two as would enable the subsidiary to balance its accounts for the year.
>
> In deciding what relief Coming Fashions, Ltd., was to have, appellants had regard solely to the amount of the deficit and not to the amount which stood nominally debited to Coming Fashions, Ltd., for work done in the year.

The commissioner then proceeded as follows:

> On these facts, I am of opinion that Odhams Press, Ltd., in writing the sum of £2,927 off the trading account between themselves and Coming Fashions, Ltd., did so to enable Coming Fashions, Ltd., to continue to carry on its business as compiler and vendor of the periodical EVERYWOMAN'S, and that, therefore, the sum written off was not so written off wholly and exclusively for the purpose of the trade or business of the appellants.

My Lords, there can be no doubt that limited companies who carry on business are separate taxable persons, and the profits and gains of their several businesses are separate profits and gains for the purposes of the Income Tax Acts. This is none the less true if one of the companies should be the parent company and the other or others its subsidiaries, of which the shares are held or owned by the parent company.

It is equally plain that the appellants stood towards Coming Fashions, Ltd., in a two-fold relationship. They were in a sense proprietors of that concern, in so far as they held all the shares in it. Its dividends, if any, came to the appellants, and, on a winding-up of Coming Fashions, Ltd., its assets, after payment of debts, liabilities and costs, would be the property of the appellants. On the other hand, there was also another, and a quite different, relationship between the two companies—namely, that of tradesman and customer. It should be added that there is no suggestion that the sum of £2,927 5*s.* 8*d.* was written off as a bad debt.

My Lords, for my part I am unable to detect any ambiguity in the finding of the commissioner in the supplemental case which I have above quoted. It seems to me that he was exactly answering the first of the two questions which he was asked by the order of the Court of Appeal to answer, and he was giving his reason for the answer. Plainly, he did not intend to say that the appellants wrote off the £2,927 5*s.* 8*d.* without any regard to their own interests. It was sufficient for his purpose to find that the sum was not written off wholly and exclusively for the purpose of the appellants' trade. Is there any real ground for contending, on the evidence, that one reason for writing off the sum was not to enable Coming Fashions, Ltd., to continue to carry on its business as compiler and vendor of EVERYWOMAN'S ? My Lords, the question thus put answers itself. There were beyond dispute the two relationships between the company and Coming Fashions, Ltd., already referred to. The allowance of the £2,927 5*s.* 8*d.* to Coming Fashions, Ltd., might have been "laid out or expended for the purposes of the trade" of the company, or for the purposes of the trade of Coming Fashions, Ltd., or to some extent for both purposes, and it is plain that these facts alone were sufficient to show that there was evidence to justify the conclusion of the commissioner that the sum written off was not written off wholly and exclusively for the purpose of the trade or business of the appellants. In these circumstances, I am of opinion that this appeal should be dismissed with costs.

LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD ROMER concurred.

Appeal dismissed with costs.

Solicitors: *Simmons & Simmons* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re BARING'S SETTLEMENT TRUSTS.
BARING BROTHERS & CO., LTD. *v.* LIDDELL.

[CHANCERY DIVISION (Morton, J.), **May 9, 10, 1940.**]

Settlements—Forfeiture—Determination of life interest in event of income becoming "vested in or payable to other person"—Writ of sequestration—Income payable to sequestrators.

By the joint effect of a settlement and a confirmatory deed executed in 1921, certain trust funds were settled upon trust to pay the income to the first defendant during her life until, *inter alia,* some event "whereby the said income or any part thereof should become vested in or payable to or charged in favour of some other person." There followed certain discretionary powers exercisable by the trustees, the plaintiffs to the present summons. On Nov. 27, 1935, a writ of sequestration was issued against the first defendant whereby the sequestrators were empowered to take possession of the first defendant's real and personal estate until she should clear herself of a certain contempt of court of which she was guilty. Thereupon the solicitors acting on behalf of the sequestrators informed the plaintiffs that they were not to pay any part of the income of the fund to the first defendant, but to remit such income to the sequestrators. In Mar., 1939, the first defendant cleared her contempt of court, and the writ of sequestration was dissolved by order of the court. The present summons was then issued to determine whether or not the first defendant's life interest had been determined by the request made to the trustees on behalf of the sequestrators in pursuance of the writ of sequestration. On behalf of the first defendant's husband and children, it was contended that forfeiture took place when the first defendant was deprived of the actual enjoyment of her interest. On behalf of the first defendant, it was contended that, on the true construction of the document, forfeiture was to take place only if some other person should obtain a beneficial interest, and that, as the notice of the writ of sequestration did not operate so as to confer a beneficial interest on any person, there could be no forfeiture :—

HELD : as, on the true construction of the document, the first defendant's life interest was to determine as soon as she should lose the personal enjoyment thereof, the notice of the writ of sequestration resulted in a forfeiture.

[**EDITORIAL NOTE.** The question in this case is whether the words in the forfeiture clause " payable to some other person " are to be read literally or whether they are to be taken as meaning that the tenant for life shall have been deprived of the personal enjoyment of the income. The reason given for adopting the latter construction is that there was an intention on the part of the settlor that there should be a continuous benefit under this clause—that is to say, that the income should be paid either to the tenant for life or to the person or persons entitled under the discretionary trust.

AS TO ACTS INVOLVING FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 597-600, para. 870 ; and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.]

Cases referred to :

(1) *Seymour* v. *Lucas* (1860), 1 Drew. & Sm. 177 ; 5 Digest 668, *5930* ; 29 L.J.Ch. 841 ; 3 L.T. 10.

(2) *White* v. *Chitty* (1866), L.R. 1 Eq. 372 ; 5 Digest 664, *5898* ; 35 L.J.Ch. 343 ; 13 L.T. 750.

(3) *Dixon* v. *Rowe* (1876), 35 L.T. 548 ; 21 Digest 598, *1836*.

(4) *Re James, Clutterbuck* v. *James* (1890), 62 L.T. 454 ; 5 Digest 666, *5912*.

(5) *Re Hastings, Ex p. Brown* (1892), 61 L.J.Q.B. 654 ; 5 Digest 815, *6932* ; 67 L.T. 234.

(6) *Re Sartoris's Estate, Sartoris* v. *Sartoris*, [1892] 1 Ch. 11 ; 5 Digest 666, *5914* ; 61 L.J.Ch. 1 ; 65 L.T. 544.

(7) *Re Tancred's Settlement, Somerville* v. *Tancred, Re Selby, Church* v. *Tancred*, [1903] 1 Ch. 715 ; 40 Digest 561, *1005* ; 72 L.J.Ch. 324 ; 88 L.T. 164.

(8) *Re Swannell, Morice* v. *Swannell* (1909), 101 L.T. 76 ; 40 Digest 560, *1001*.

(9) *Re Laye, Turnbull* v. *Laye*, [1913] 1 Ch. 298 ; 5 Digest 668, *5925* ; 82 L.J.Ch. 218 ; 108 L.T. 324.

(10) *Re Marshall, Marshall* v. *Whateley*, [1920] 1 Ch. 284 ; 39 Digest 50, *618* ; 89 L.J.Ch. 204 ; 122 L.T. 673.

(11) *Re Salting, Baillie-Hamilton* v. *Morgan*, [1932] 2 Ch. 57 ; Digest Supp. ; 101 L.J.Ch. 305 ; 147 L.T. 432.

ORIGINATING SUMMONS to determine whether, upon the true construction of a settlement, forfeiture of a life interest of the first defendant, Mrs. Liddell, had taken place by the issue of a writ of sequestration against the life tenant or by any act done by the sequestrators thereunder. By the joint effect of a settlement and confirmatory deed, both made in 1921, a share of certain trust funds was held for the first defendant upon the following trusts:

> . . . upon trust to pay the income thereof to such child during his or her life until he or she shall become bankrupt or shall assign or charge or effect to assign or charge the said income or any part thereof or until some other act or event shall happen (other than a consent to any exercise of the power of advancement hereinafter contained) whereby the said income or any part thereof if belonging absolutely to such child would become vested in or payable to or charged in favour of some other person or a corporation and shall after the determination during the life of such child of the trust in his or her favour of the said income from time to time during the remainder of the life of such child or during such shorter period or periods either continuous or discontinuous as the trustees in their absolute discretion think fit pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons namely the child whose life interest has so become determined and any husband or wife and any child or remoter issue for the time being in existence of such child and whether minors or adults and the other persons or person for the time being entitled or interested whether absolutely or contingently to or in such share under the trusts herein contained to take effect after the decease of such child in such proportion and manner as the trustees shall in their absolute discretion from time to time think proper And subject to the discretionary power aforesaid shall during such remainder of the life of such child hold the said income or so much thereof as shall not be applied under such discretionary power upon the trusts and for the purposes upon and for which the said income would for the time being be held in case such child were then dead And it is hereby agreed and declared that from and after the decease of such child the trustees shall hold such child's share both capital and income . . .

In 1935, the court made an order making the infant children of the first defendant wards of court. As the children were then with the first defendant in the United States of America, the order proceeded to order the first defendant to bring them within the jurisdiction of the court within 21 days after the service of the order. As the order was not complied with, a writ of sequestration was issued, and the sequestrators claimed the income of the settled funds. The income was not in fact paid over, but was placed in a separate account. The first defendant returned to England with the children in Dec., 1938, and on Mar. 11, 1939, the writ of sequestration was dissolved. On Apr. 28, 1936, the solicitors for the sequestrators wrote the following letter to the trustees of the settlement:

> On behalf of the sequestrators of the income of [the first defendant] we are instructed to request you to be good enough to let us have a cheque for the income at present in your hands payable under [the settlement]; together with the income due under the will of Mrs. Cecil Baring deceased. It would be a matter of convenience to us if you would be good enough to let us have all future monthly payments of income from each of these sources at or about the 15th of each future month until further notice.

The trustees did not in fact pay over the income to the sequestrators or their solicitors, but placed it in a separate account. The question for determination on this summons was as follows:

> Whether on the true construction of the said settlement the life interest of [the first defendant] in the income of the trust premises subject to the said settlement and deed of confirmation was determined by the issue on Nov. 27, 1935, of a writ of sequestration against the said defendant or by any act done by the sequestrators thereunder.

J. Pennycuick for the plaintiffs, the trustees.

Rt. Hon. Sir William Jowitt, K.C., and *W. F. Waite* (for *Hon. B. L. Bathurst* on war service) for the first defendant, Mrs. Liddell.

J. H. Stamp for the other defendants, the husband of the first defendant and her infant children.

MORTON, J.: In view of the course which the argument has taken, I propose to confine my decision to the question whether or not Mrs. Liddell's life interest was determined on the date of the notice given to the trustees on Apr. 28, 1936. Counsel for the defendants other than the first defendant says that on that date an event happened whereby the income of Mrs. Liddell's share, if belonging absolutely to Mrs. Liddell, would become payable to some other persons—namely, the sequestrators. It is clear that, if the forfeiture clause in the settlement is read quite literally, that argument must succeed. On the date in question, on a literal reading of the words, the income, if belonging absolutely to Mrs. Liddell, would have become payable to the sequestrators. However, Sir William Jowitt invites me to put on it a construction which, he says, is consistent with the intention of the settlor as manifest in this clause. Reading the clause as a whole, and reading the words "payable to" in their context, they are preceded, as he points out, by the words "vested in," and are followed by the words "charged in favour of," and he and Mr. Waite say, in effect, that the contrast which the settlor had in mind was between the child being entitled to the income and some other person becoming beneficially entitled to the income, or some part thereof. They say that, on the true construction of the clause, the forfeiture arises only if the income, or part of it, becomes payable to other persons in such a way that these other persons (or someone other than the tenant for life, for whom they are acting, or whom they represent) may obtain a beneficial interest in it. It is necessary, they say, for there to have arisen a situation in which the tenant for life is not the only beneficiary. I quote the phrase used by Mr. Waite in reply.

Mr. Stamp, on the contrary (although he does not ask me to read the words in their completely literal sense), contends that it is enough to give rise to a forfeiture if the tenant for life is deprived of the actual enjoyment of the income, so that she can no longer put her hands upon it and use it for her own purposes. He contrasts the position while the sequestration order was in force with that in which the income becomes payable to somebody who is merely a trustee for the tenant for life, or an agent for the tenant for life, in such circumstances that the tenant for life can get it from that trustee or agent at any time.

In his very helpful review of the authorities, Sir William Jowitt referred me to a number of cases. He did not suggest that the point which I have to consider is completely covered by authority, but he cited a number of cases bearing upon that problem to a greater or lesser degree. The first case is *Seymour* v. *Lucas* (1). The headnote states the facts as follows:

> Testator limited real and personal estate to trustees for A.B. for life; with a limitation over in case he should thereafter become bankrupt or insolvent, etc., or if by his act or default the rents, etc., should become vested in or payable to any other person. The tenant for life was insolvent before the date of the will; there was the usual power of attorney, and judgment was entered up, but nothing further done, and the tenant for life did not in any manner alienate after the date of the will:—
>
> Held: that judgment, without more, only operated as an equitable charge, and did not vest the rents in or make them payable to the assignees.

The other point dealt with there is not material for the present purposes. However, in dealing with the point as to whether or not the rents vested in, or were payable to, other persons, Sir Richard Kindersley, V.-C., says at p. 180:

> The question is, whether any one of the several events pointed out has happened, because it maybe that some one of them has happened, . . . though the others have not. Now I will not consider them in their order, but take the last first, "if the said rents, issues," etc. (p. 177). Upon that the question is, whether by any means the rents have become vested in or payable to any other person than Frederick Richard Chadwick, and I am of opinion they have not. There was an insolvency; but it does not signify on this part of the case, whether it was prior or subsequent to the death of the testator. The question is only, have the rents become payable to or vested in the assignee? Now there was the usual warrant of attorney executed, and judgment has been since entered up, and that is all, nothing further has been done. What then is the effect of the judgment entered up? It is that, under the Judgments Act, 1838, s. 13, judgment shall operate as a charge; it will operate precisely in the same way and to the same extent as if there had been an agreement by F. R. Chadwick with the assignee, to give him a charge; it has no greater effect. Now if there had been such a contract, would that make the rents vested in or payable to the assignees? I think not. The party having the charge might institute a suit to obtain the benefit of his charge, but he would have no immediate right to receive the rents, nor would they be vested in him. I think therefore that the event last referred to has not happened.

The judgment seems to me on that point to rest on the fact that there was nobody in the events which happened, who had an immediate right to receive the rents. In the present case, the sequestrators, if the income had belonged to Mrs. Liddell absolutely, would have had an immediate right to receive the rents, by reason of their appointment as sequestrators. I do not think that that case is of any real assistance to Mrs. Liddell.

The next case is *White* v. *Chitty* (2), the headnote of which states the facts as follows:

> Testator devised freeholds to C. for life, with a clause of forfeiture on bankruptcy. In the testator's lifetime, C. was adjudicated a bankrupt, and had not obtained his order of discharge at the testator's death; but no creditors' assignee was ever appointed; and within 4 months after the testator's death, the bankrupt applied for and obtained an annulment of the bankruptcy. The official assignee had not, during the interval, applied for or obtained possession of the rents, C. himself having been in occupation of the estate:—
>
> Held, following the authorities, that the clause must extend to a bankruptcy occurring in the testator's lifetime . . .

The other point which arose in the case was dealt with by Sir William Page Wood, V.-C., in this way, at p. 377:

> . . . I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them.

That case again, I think, is clearly distinguishable from the present case.

The next case is *Dixon* v. *Rowe* (3), in which, I think, the facts are accurately stated as follows in the headnote:

> Testator gave an annuity to the plaintiff for life, or until he should assign or encumber his interest under the will, or any part thereof, or until he should do or suffer some act or thing, or something should occur, whereby his interest under the will, or any part thereof, should, or might be, or but for that stipulation would, A become vested in some other person, or whereby he would cease to be beneficially in receipt of the annuity; the testator also gave two other specific gifts to the plaintiff, to which the same clause of forfeiture was by reference appended, and a share of the ultimate residue of his estate to which the forfeiture clause did not apply. In Dec., 1874, a writ of sequestration was issued against the plaintiff. Upon this the trustees of the will were advised that the forfeiture took effect, and they ceased to pay the proceeds of the annuity and the other gifts to the B plaintiff. In Mar., 1875, the plaintiff commenced this suit against them. In May, 1875, the plaintiff's interest in the residue of the testator's estate was sold under an order of the court that issued the writ of sequestration. A special case was stated for the opinion of the court as to whether the plaintiff's interest under the will had not ceased under the forfeiture clause.

The headnote then proceeds as follows:

> C HELD, that plaintiff was no longer entitled to receive the annuity, or the proceeds of the other gifts, which ceased to be payable from the date of the sale of the residue; that all further proceedings in the suit must be stayed, and that plaintiff must pay the costs of the suit and the special case. Held also, that plaintiff had no ground of action against the trustees, and that they were perfectly right in refusing to pay the annuity and proceeds of the other gifts after the issue of the writ of sequestration, and that plaintiff must pay the costs of a motion made to D restrain their paying them to anyone but himself.

Reading the first portion of the passage which I have just read, it would appear that the decision comes to no more than that the forfeiture took place on, and not before, the sale of the residue. If that had been so, this case would have been of some assistance to Sir William E Jowitt's argument, but what took place was this. BACON, V.-C., first of all dealt with the construction of the will, and then stated, at p. 550:

> . . . I therefore must hold that the plaintiff is not entitled to receive the annuity of £90, that he is not entitled to receive any longer that part of the rents of Providence Wharf, nor the rents and profits of 27, Tennyson Street, given upon the same F trusts as were declared concerning the annuity of £90, all which ceased to be payable from May 6, the date of the sale to Wingfield, at which time the "vesting" contemplated by the testator operated.

If the judgment had ended there, the sale having taken place in May, 1875, and the writ of sequestration having been issued in Dec., 1874, G it would appear to be a decision that the issue of the writ of sequestration did not give rise to a forfeiture. However, there was then an argument in regard to the suit which the plaintiff had commenced against the trustees in Mar., 1875—that is to say, between the date of the writ of sequestration and the date of the sale. The decision of BACON, V.-C., H was stated as follows, at p. 551:

> . . . the plaintiff had no right to file his bill after the sequestration was issued, and . . . the trustees were quite right. The order would, therefore, be to stay all further proceedings in the suit, the plaintiff to pay the costs of the suit, and the costs of the motion, and special case.

It appears to me that BACON, V.-C., in the first instance held that the sale had brought the life interest to an end, but then, his attention being drawn to the effect of the writ of sequestration, took the view that the writ had also the effect of causing a forfeiture. Otherwise, I do not see how he could have said, at p. **551** :

> . . . the plaintiff had no right to file his bill after the sequestration was issued, and . . . the trustees were quite right.

It is true that between *Dixon* v. *Rowe* (3) (on which counsel for the first defendant relied) and the present case there is the distinction that the plaintiff in the case of *Dixon* v. *Rowe* (3) had failed to pay a sum of money, and it was the non-payment of that sum of money which led to the writ of sequestration being issued.

The next case is *Re James, Clutterbuck* v. *James* (4). I do not think that I need go through all the facts in that case, because, as I read it, the judge founded his judgment upon the fact that the events which had happened did not have the result that the right to receive the income had vested in any person other than the tenant for life. That being so, KEKEWICH, J., held that the income, if belonging absolutely to the tenant for life, would not have become vested in any other person or persons. He said, at p. 455 :

> I ground my decision not upon that at all, but simply on this—that the right to receive the income never became vested in any other person.

On that ground, *Re James, Clutterbuck* v. *James* (4) is clearly distinguishable from the present case.

The next case is *Re Hastings, Ex p. Brown* (5). The facts of that case are stated shortly in the headnote as follows :

> A writ of sequestration had been issued out of the Chancery Division to enforce payment into court, under which the debtor's property, both real and personal, was seized. Before sale the debtor was adjudicated bankrupt upon the petition of other creditors, and the judge of the county court granted an injunction, under the Bankruptcy Act, 1883, s. 10, restraining the sale :—
>
> HELD, that the sequestrator was a creditor within sect. 9 (1) ; that he was not a secured creditor within the proviso in cl. (2) : that he was not an execution creditor who had completed an execution or attachment within sect. 45 ; and that the court had jurisdiction to restrain the sale.

The decision, so far as the present case is concerned, merely goes to the fact that the sequestrator is not a secured creditor. It does not, I think, throw any real light on the point which I have to decide, the position in the present case being that the sequestrators had a right to receive the money by virtue of the order and the notice given to the trustees. It is not suggested that they had a charge or lien or security within the meaning of the Bankruptcy Act.

The next case, which was strongly relied upon by Mr. Stamp, is *Re Sartoris's Estate, Sartoris* v. *Sartoris* (6), a decision of CHITTY, J., in which the headnote is as follows :

> A testator bequeathed the income of his residuary estate to his son during his life, or until he should assign or dispose of the income or some part thereof, " or become bankrupt, or do or suffer something whereby the said income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." In Oct., 1890, a petition in bankruptcy was filed against the son, and in Nov., 1890, a receiving order was made. A meeting of creditors was held

> in December and adjourned till January, when it was adjourned again, and nothing further had been done in the matter . . .

It was held by the Court of Appeal, affirming the decision of CHITTY, J., that:

> . . . though the income did not vest in the official receiver, it would, by force of the receiving order have become payable to him if it had belonged absolutely to the tenant for life, and that the interest of the tenant for life had determined.

In the course of considering the effect of a receiving order under the Bankruptcy Act, 1883, CHITTY, J., said, at p. 14:

> Upon the Act of Parliament it is quite clear that the debtor's property does not pass to the receiver; but it is equally clear that it is the duty of the receiver to execute his office, and to receive whatever property the debtor may have. If there is property in the debtor's possession, the receiver intervenes by taking possession for the purposes of protecting the property, and seeing that it reaches its ultimate destination, whatever that may be, according to the result of the bankruptcy proceedings.

It is pointed out by counsel for Mrs. Liddell that there is a distinction between the decision in *Sartoris's* case (6) and the present case, in that in the case of the receiver in *Sartoris's* case (6), although he was entitled to receive the property, its ultimate destination was uncertain, and some part of it—or, indeed, the whole of it—might have gone to a person other than the bankrupt. I agree that there is that distinction between *Sartoris's* case (6) and the present case, and the former case is not, therefore, an authority which decides the point which I have to decide. However, there are certain observations in the judgment of CHITTY, J., and the Court of Appeal which I find are of assistance. CHITTY, J., said, at p. 16:

> Having thus ascertained the effect of a receiving order, I proceed to ascertain the true meaning of the testator according to the clauses in his will. I was told by counsel for Mr. Algernon Sartoris that in construing clauses of this kind the court ought to adopt a benevolent view of the clause—benevolent, that is to say, to the person whose life interest is to cease under the clause; and it is said that the clause ought to be construed strictly, which is another mode of expressing the same thing. In my opinion neither of these phrases is useful or proper. I think it is the duty of the court to read the testator's language and ascertain from what he has said what he means, and if his intention is properly expressed and lawful, to give effect to it. It is to be remembered, though it seems to have been forgotten or probably passed by as an inconvenient topic by the counsel who were arguing for Mr. Sartoris, that he is not the sole object of the testator's bounty, but there are under this clause other persons who are equally the objects upon whom the testator intends to confer a benefit. This clause, like many others that I have had before me, is really to the effect that the income shall be possessed by a certain person until the happening of a certain event, and after the happening of that event it shall be paid to some other person. Where the events are events which the law allows, the right way is to read the clause attentively, and to ascertain from the clause itself what the testator means.

With these observations I most respectfully agree. It is often said in the course of argument—although I do not think that it was put forward as an argument before me in this case—that the court should adopt a benevolent view, or should lean against a forfeiture, or should construe the forfeiture clause strictly. To my mind, the position is as stated by CHITTY, J., and none of these phrases means anything more than that, if, after he has gone through the process of construing the clause, which is described by Chitty, J., there remains a real doubt in the minds of the court as to whether there has been a forfeiture, then that doubt should be resolved against forfeiture. The burden is upon those who allege a forfeiture to satisfy the court that a forfeiture has occurred.

Then Chitty, J., continues as follows, at p. 16:

> The testator says that the income is to go to his son during his life, or until he shall assign, charge, or otherwise dispose of the said income or some part thereof, or become bankrupt, or do or suffer something whereby the said income if belonging to him absolutely, or some part thereof, would become payable to, or vested in, some other person, whichever of the said events should first happen; and if the trusts hereinbefore declared should determine in the lifetime of Mr. Sartoris, then during the remainder of his life, on trusts, which may be shortly described as trusts for the benefit of himself, his wife, and his children under an exclusive power—that is, the power given to trustees under which they may apply the income for the benefit of any one or more of the objects—a power in their absolute discretion. The material words in this case are "do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." It was argued that there was no distinction between the words "payable to" or "vested in." In my opinion that argument cannot be maintained. This will was made in 1887, and it is not the practice or the duty of the court to attribute to any testator ignorance of the law unless there is something in the will to justify it. In this case it appears to me that the testator has endeavoured to express himself accurately, and I have no right to say that the two phrases that he has used, that is, "payable to" or "vested in," are identical in meaning, unless I can find some sufficient ground for so doing. The history of these clauses is well-known. Those who assist testators in framing them become aware from time to time of decisions, and if they find that new cases arise and the old forms are insufficient to meet the event, which is intended to be the event, testators come with the assistance of those learned in the law by degrees, as we see, to draw these clauses more and more carefully. This clause on the face of it is carefully expressed, and I am not at liberty to reject the words "payable to."

In the present case, I have three alternatives specified in this particular part of the will—namely, "vested in or payable to or charged in favour of"—and it seems to me that, to quote the words of Chitty, J., at p. 17:

> . . . I have no right to say that the two phrases that he has used, that is, "payable to" or "vested in," are identical in meaning . . .

Then Chitty, J., continues as follows, at p. 17:

> Now, that being my view of the construction of the clause, the question is, has the income or some part thereof become "payable to" some other person than Mr. Sartoris? It appears to me that there is only one possible answer to that question.

Then Chitty, J., answers it in the affirmative.

In the Court of Appeal there is one passage which I desire to read from the judgment of Lindley, L.J., at p. 22:

> What is the effect of appointing a receiver in the Chancery Division? It operates as an injunction restraining the defendant from getting in money which the receiver is appointed to receive. The fallacy of the appellant's argument is that as income to which the debtor is entitled does not vest in the receiver and so he cannot sue for it in his own name, therefore the debtor is still the party to receive it.

I think that that passage is of some assistance, in that it points out, and draws attention to, the fact that the effect of appointing a receiver is to restrain the defendant from getting in money.

The next case, which I can deal with quite shortly, is *Re Tancred's Settlement, Somerville* v. *Tancred* (7), in which the headnote is as follows:

> A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, and gave them power to pay the A expenses of managing the trusts:
>
> HELD, that this was not a disposition or attempted disposition of his life interest so as to cause it to be forfeited.

I think that it is correct to say of that case that all that the life tenant did was to alter his mode of enjoyment. BUCKLEY, J., said, at p. 724:

> B The clause is intended to provide that, if a tenant for life disposes or attempts to dispose of his interest so as to lose the enjoyment of it himself, or if he should become bankrupt, his life estate should cease and be given over to others. This has not happened. Seymer Mitford Tancred remained after the settlement the only person entitled to the income. The mere fact that the trustees may be entitled to have their expenses recouped to them out of the income does not make it a disposition within the clause. It is parallel to the case of a person who is going abroad and appoints somebody to collect his rents on the terms that he should be C paid by deducting a commission. Neither is the appointment of the trustees to be his attorneys to recover the income an assignment. He only appointed them to act as his agents, retaining the beneficial interest himself.

The position there was that, although Tancred had assigned the life interest to trustees of his marriage settlement, he was in a position to D put his hand upon the income at any time. It is true that the decision does show that the mere fact that the trustees were entitled to take their expenses out of the income did not make the assignment a disposition within the clause. That might have been material had Mr. Stamp relied in the present case upon any rights which the seques-E trators have to retain their expenses out of the money, but he has not put forward any such argument.

The next case is *Re Swannell, Morice* v. *Swannell* (8), a decision of EVE, J. That was a case where an attorney had been appointed to receive the income, and it was held that, the power of attorney being a F mere authority to receive the income, it did not constitute a forfeiture within the meaning of the forfeiture clause. In that case, the effect of the execution of the power of attorney did not deprive the tenant for life of the right to receive the income, and EVE, J., held that there was no forfeiture.

G The next case is *Re Laye, Turnbull* v. *Laye* (9), also a decision of EVE, J., in which he held, at p. 302:

> . . . that in all cases in which the life interest is to determine on the happening of any event, whereby the income or any part of it would, if belonging absolutely to the tenant for life, be payable to some other person, such determination is brought about wherever a receiving order is made and income comes to the hands of the H trustees before it is discharged.

That case again is distinguishable from the present case on the ground to which I have already referred in other cases—namely, that the making of the receiving order was consequent upon the failure of the tenant for life to pay his creditors.

The only other case referred to before me was *Re Marshall, Marshall*

v. *Whateley* (10), where it was held that an order in lunacy appointing a receiver did not operate as a forfeiture under the clause:

> . . . until he shall become bankrupt or shall assign or charge or affect to assign or charge the said income or some part thereof or until some other event shall happen whereby if the income belonged absolutely to him he would be wholly or partially deprived of the personal enjoyment thereof.

Lastly, there was *Re Salting, Baillie-Hamilton* v. *Morgan* (11). I do not think that either of these cases is of any real assistance in the problem which I have to consider.

These being the authorities, I have to make up my mind whether or not there has been a forfeiture in this case. In my view, there has. I think it is true to say that, having regard to such cases as *Re Tancred's Settlement, Somerville* v. *Tancred* (7) and *Re Swannell, Morice* v. *Swannell* (8), one cannot read the words "payable to some other person" in a completely literal sense, but, to my mind, on the true construction of this clause, the testator did intend that, if an event happened whereby, if the income belonged absolutely to the tenant for life, she would be deprived of the personal enjoyment of it and the right to hold it and spend it and use it, then a forfeiture should occur. I think that he intended that there should be, as Mr. Stamp put it, a continuous benefit to the beneficiaries, and that either the tenant for life should be in a position to have the income or the discretionary trust should arise.

The result of giving effect to the arguments of Sir William Jowitt would be curious in this respect. The sequestration might have lasted for years. It might have lasted, indeed, for the whole of the life of the tenant for life, for she might have stayed in America and refused to come back. Yet, if the argument on behalf of Mrs. Liddell is correct, she could not have touched the income, because of the sequestration, and the income would be piling up in the hands either of the sequestrators or of the trustees, if they declined to hand it over. I do not think that such a result as that is in accordance with the intention of the settlor. I think that he intended that there should be a continuous benefit under this clause. For these reasons, I hold that, within the meaning of the clause, an event happened which determined the life interest.

Life interest forfeited by first defendant as from date of notice to trustees. Costs as between solicitor and client payable out of accumulations of income.

Solicitors: *Freshfields, Leese & Munns* (for the plaintiffs); *Gordon, Dadds & Co.* (for the first defendant); *William Charles Crocker* (for all other defendants).

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

HOUGH *v.* LONDON EXPRESS NEWSPAPER, LTD.

[COURT OF APPEAL (Slesser, Clauson and Goddard, L.JJ.), **May 1, 9, 1940.**]

Libel and Slander—Libel—Words not defamatory in primary sense—Special circumstances—Innuendo.

The plaintiff was the wife of a boxer, but had not lived with him for some years. There was a child of the marriage, and the husband had been ordered to pay maintenance in respect of that child. The husband was, however, still living in the same district as his wife, and the latter was known to her neighbours as the wife of the boxer. A newspaper printed an article purporting to refer to the boxer's wife, but, from the description given, it was obvious to those who knew the wife that another person was referred to. The plaintiff then brought an action for libel, alleging that the words by innuendo meant that she was falsely representing herself to be the wife, and that she was an unmarried woman who had cohabited with and had had children by the boxer:—

HELD: (i) the words were defamatory, as reasonable persons, knowing the circumstances, would understand the words in a defamatory sense.

(ii) it was not necessary for the plaintiff to prove that one or more persons understood the words in a defamatory sense. It is sufficient that reasonable persons might so understand them.

[**EDITORIAL NOTE.** It is not necessary that a person publishing a defamatory statement should intend that the statement should refer to the plaintiff. It is sufficient that reasonable persons should understand it to refer to the plaintiff. The words need not be defamatory in their primary sense. They are actionable if the existence of certain circumstances makes it reasonable that persons, to whom those circumstances are known, might understand them in a defamatory sense. It is not necessary to prove that in fact persons with such knowledge did so understand them.

AS TO WORDS NOT DEFAMATORY IN THEIR PRIMARY SENSE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 421-423, paras. 507, 508; and FOR CASES, see DIGEST, Vol. 32, pp. 60, 61, Nos. 878-885.]

Cases referred to:

(1) *Cassidy* v. *Daily Mirror Newspapers*, [1929] 2 K.B. 331; Digest Supp.; 98 L.J.K.B. 595; 141 L.T. 404.

(2) *Capital & Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; 32 Digest 21, *121*; 52 L.J.Q.B. 232; 47 L.T. 662; *affg.* (1880), 5 C.P. 514.

(3) *Hulton (E.) & Co.* v. *Jones*, [1910] A.C. 20; 32 Digest 17, *77*; 79 L.J.K.B. 198; 101 L.T. 831.

(4) *Tolley* v. *Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333; Digest Supp.; 100 L.J.K.B. 328; 145 L.T. 1; *affg.*, [1930] 1 K.B. 467.

(5) *Daines & Braddock* v. *Hartley* (1848), 3 Exch. 200; 32 Digest 60, *883*; 18 L.J.Ex. 81; *sub nom. Danes* v. *Hartley*, 12 L.T.O.S. 271.

(6) *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156; 32 Digest 49, *577*; 50 L.J.P.C. 11; 43 L.T. 710.

APPEAL by the defendants from a judgment of CROOM-JOHNSON, J., dated Dec. 18, 1939. The action was for an alleged libel published in a newspaper. The plaintiff, Florence Sarah Hough, married Frank Hough in 1933 and lived with him in Battersea as his wife and had one child by him. In Feb., 1936, he deserted her, and in June, 1936, he was ordered to pay maintenance for the child. He was known at Battersea, where he had lived at the time of the order, and after the desertion he continued to live there. He acquired some notoriety as a boxer, and the plaintiff became known in the district as his wife. On Dec. 22, 1937, an article appeared in the *Daily Express*, a newspaper owned by the defendants, containing the words :

> Frank Hough's curly-headed wife sees every fight. "I should be in more suspense at home," she says. "I always get nervous when he gets in the ring, A although I know he won't get hurt. Nothing puts him off his food. He always eats a cooked meal last thing at night, however late it is when he gets in."

The plaintiff's hair was not curly. She sued the defendants for libel, alleging that by innuendo the words meant that she was a dishonest woman falsely representing herself to be, and passing as, the wife of Frank Hough, and that she was an unmarried woman who had cohabited B with, and had children by, Frank Hough.

The article excited much comment in the neighbourhood, and many of the plaintiff's acquaintances asked her about it. She judged it best to keep to her house for a week. There was no suggestion that the neighbours had any reason other than the publication of the article for C making her feel so uncomfortable. No witness said that she thought that the article was true, or that the curly-headed woman was Hough's lawful wife. The judge held, following *Cassidy* v. *Daily Mirror Newspapers* (1), that the statement was capable of bearing the defamatory meaning alleged in the innuendo. He was satisfied that two women D who saw the newspaper thought that it referred to the plaintiff, and, therefore, held in law that the words were capable of being understood to refer to the plaintiff. He also thought that he must draw the inference from the evidence that people thought that there was something amiss with the plaintiff's moral character, and, having done so, he felt E bound to hold that this was what reasonably-minded people would think of the words complained of. He awarded £52 10*s*. damages, and costs.

G. O. Slade for the appellants.

D. F. Brundrit, for the respondent, was not called upon.

F

SLESSER, L.J. : In this case, it is not suggested that the words complained of are defamatory in their primary and natural meaning. The action is based entirely upon the innuendo pleaded in para. 3 of the statement of claim to this effect :

> G The said words were falsely and maliciously printed and published by the defendants of and concerning the plaintiff in that the said curly-headed woman who sees every fight of Frank Hough's is some woman not the plaintiff and not lawfully married to the said Frank Hough and the said words meant and were understood to mean that the plaintiff was a dishonest woman falsely representing herself to be and passing as the wife of the said Frank Hough and that the said Frank Hough was not her husband and she was an unmarried woman who had cohabited with and had had children by the said Frank Hough without being H married to him.

In these circumstances, it was necessary at the trial to prove by evidence that the matter published in the particular case conveyed to the mind of a normal person cognisant of the special circumstances that which it would not convey to the mind of a normal person unacquainted therewith. In the present case, the special circumstances which had to be proved were that the plaintiff was the wife of Frank Hough and was known to her acquaintances to have held herself out to be his wife. On this head, there is ample evidence that many of Mrs. Hough's neighbours knew her to be the wife of Frank Hough, and that, when the article appeared, according to the evidence of Mrs. Pitman and Mrs. Meredith, who lived next door to Mrs. Hough, wherever they went they were talking about it, or, to quote Mrs. Pitman "one or two of the streets were all talking," and, as Mrs. Meredith said, "they were all talking about it, one and the other, all looking at the papers and buying them. There was a run on the *Daily Express*."

In these circumstances, the judge, sitting without a jury, has come to the conclusion that the article would convey to people acquainted with such facts the imputation that the lady, instead of being a respectable married woman, as she represented herself to be, was not a respectable person at all, and this finding seems to me entirely consistent with the evidence. In *Cassidy* v. *Daily Mirror Newspapers* (1), SCRUTTON, L.J., said, at p. 340:

> In my view, the words published were capable of the meaning "Corrigan is a single man," and were published to people who knew the plaintiff professed to be married to Corrigan; it was for the jury to say whether those people could reasonably draw the inference that the so-called Mrs. Corrigan was in fact living in immoral cohabitation with Corrigan, and I do not think their finding should be interfered with.

In that case, the defendants had published in their newspaper a photograph of Mr. Corrigan and a Miss X. with the words:

> Mr. M. Corrigan, the race horse owner, and Miss X., whose engagement has been announced.

The plaintiff was known to her acquaintances as the lawful wife of Mr. Corrigan, and it was held by the majority of the court that such a publication was capable of conveying a meaning defamatory of the plaintiff, the jury having found that it conveyed to reasonably-minded people possessed of such information an aspersion on her moral character. The only difference, on the facts, between *Cassidy's* case (1) and the present is that here the woman who was said to have been associated with Hough was stated to be his wife, and not his fiancée, and the inference drawn in *Cassidy's* case (1) by the jury was here drawn by the judge, who had to perform their duties. *Cassidy's* case (1) in this respect did not lay down any new law. The only qualification of the existing law there made was that it is not necessary in order to give a defamatory meaning to a statement, *ex facie* innocent but defamatory by reason of extrinsic facts, that those facts must be known to the person publishing the statement, as had been held by BRETT, L.J., in *Capital & Counties Bank* v. *Henty* (2). This earlier view was dissented from because, in the language of RUSSELL, L.J., in *Cassidy's* case (1), at p. 353:

> . . . it [could] not survive the decision in the House of Lords in *Hulton (E.) & Co.* v. *Jones* (1).

The only question remaining in the present case is this. There were called by the plaintiff, perhaps unnecessarily, two witnesses who, among other matters, spoke to the meaning which the passage complained of represented to their minds. Mrs. Pitman said that she knew that it was not Mrs. Hough who was referred to in the article, and that in fact she knew that Mrs. Hough was married to Frank Hough. Mrs. Meredith, who had known Mrs. Hough for 20 years, said that she knew that the curly-headed woman who had attended the fights was not Mrs. Hough. On this, it is argued by the appellants that the only evidence adduced in the case was to the effect that persons reading the article would not regard it as reflecting upon Mrs. Hough as a married woman, since they knew that the person referred to in the article was not Hough's wife. This argument, however, rests upon a misconception.

The burden on the plaintiff is to give evidence of special circumstances which would lead reasonable persons to infer that the words were understood in a defamatory meaning, provided that such circumstances were known to those persons to whom the words were published: *Capital & Counties Bank* v. *Henty* (2). Greer, L.J., said in *Tolley* v. *Fry* (*J. S.*) *& Sons, Ltd.* (4), at p. 480:

> The evidence required is evidence of special facts, causing the words to have a meaning revealed to those who knew the special facts, but not revealed by the words used in the absence of such knowledge. It is not proof of a special fact in this sense merely to call a number of people to say that they understood the words in a defamatory sense; they would have to prove some fact known to them which would be sufficient to entitle any reasonable man with such knowledge to interpret the words in a defamatory sense.

Conversely, here the mere fact that two women knew that Mrs. Hough was Hough's wife, and so did not regard the article as defamatory upon her, though possibly as defamatory upon the curly-headed woman, or upon Hough himself, does not acquit the defendants of liability.

People with the knowledge that Mrs. Hough represented herself to be the wife of Hough, and that in this country a man may marry only one woman at a time, might very probably come to the conclusion that the article contained an aspersion upon the moral character of Mrs. Hough. It is true that, the special circumstances being proved and the foundation laid, a witness may be asked the question: "What did you understand by the words?" (*Daines & Braddock* v. *Hartley* (5), considered in *Simmons* v. *Mitchell* (6), at p. 163.) In this case, such questions unnecessarily addressed to Mrs. Pitman and Mrs. Meredith have presented the appellants with an argument, albeit an unsound one. However, the evidence of Mrs. Pitman and Mrs. Meredith on this head amounts to no more than that those two particular persons did not regard the article as an aspersion. It by no means follows that others with knowledge of the facts would not think otherwise of the plaintiff. The judge properly drew the inference that such reasonable persons, knowing the circumstances, would generally regard the article as defamatory. Consequently, this appeal fails.

I am asked by CLAUSON, L.J., to say that he agrees with this judgment and has nothing to add.

GODDARD, L.J.: The question of law which arises in this case may be stated thus. Where words are not defamatory in their ordinary
A meaning, but by reason of special facts are capable of being understood in a secondary and defamatory sense by persons to whom the special facts are known, is it necessary to prove more than that there are people who know the special facts, and so might understand the words in a defamatory sense, or must there be evidence that some person did so
B understand them? In my opinion, it is unnecessary, though I do not say inadmissible, to call persons to say that they did so understand the words, provided that it is proved that they are people who might so understand them. Such witnesses were called in *Cassidy* v. *Daily Mirror Newspapers* (1). In the case of words defamatory in their ordinary
C sense, the plaintiff has to prove no more than that they were published. He cannot call witnesses to prove what they understood by the words. Nor will it avail the defendant to call any number of witnesses to say that they did not believe the imputation. The only question is whether reasonable people might understand them in a defamatory sense. Thus,
D when circumstances are proved which will clothe with a defamatory meaning words otherwise innocent, the question must equally be whether reasonable people who know the special circumstances might understand them in a defamatory sense. If words which impute discreditable conduct to my friend are used, he has been defamed to me, although I
E do not believe the imputation, and may even know that it is untrue. Thus, if it be said of A that he is a forger, no witnesses are necessary, or can, indeed, be called, to say that they believed the charge. If, then, he being a married man, it is said of him, "Yesterday he married Miss X.," it defames him to those people who know that he already has
F a wife, even if they do not believe he has actually committed bigamy. In the present case, there was evidence that the plaintiff was the wife of Frank Hough and was living apart from him, and that this fact was known to persons in the neighbourhood. In view of the decision in *Cassidy* v. *Daily Mirror Newspapers* (1), the words published are capable
G of being understood by those neighbours in a sense defamatory of the plaintiff. The judge was justified, therefore, in holding that, had there been a jury, there was a case to be left to them, and it was immaterial that the two witnesses who were called did not themselves believe the imputation which they conveyed. It follows, then, that, sitting as a
H jury, the judge could find that the words were in fact defamatory of the plaintiff.

Had it not been for the decision in *Cassidy* v. *Daily Mirror Newspapers* (1), I should not have held that a statement that a man who in fact has a wife is about to get married, or that he has a wife who is clearly indicated as being someone other than his lawful wife, was capable of conveying to reasonable people that the latter had been living with him as his mistress. Such a statement would no doubt be defamatory of, and actionable by, the man, provided, of course, that he had not procured the publication, as Cassidy did, and might well be so of the other woman also, but I feel precisely the same difficulties as did Greer, L.J., in holding that, in these circumstances, reasonable people would impute A immorality to the lawful wife. However, in view of that decision, I think that both the judge and this court are bound to hold that the words in this case are capable of bearing the meaning put upon them.

Appeal dismissed.

Solicitors: *Shirley Woolmer & Co.* (for the appellants); *H. C. L.* B *Hanne & Co.* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

OLDS DISCOUNT CO., LTD. *v.* KRETT AND KRETT. C

[King's Bench Division (Stable, J.), **April 26, 1940.]**

Sale of Goods—Disposition by seller in possession—Goods sold to finance company in hire-purchase transaction—Subsequently seized by shopkeeper—Resale for cash—Title of second purchaser—Bills of Sale Act, 1878 (*c.* 31)—*Bills of Sale Act* (*1878*) *Amendment Act,* 1882 (*c.* 43)— D *Sale of Goods Act,* 1893 (*c.* 71), *s.* 25 (1).

The plaintiffs were a company financing hire-purchase transactions. They had financed such a transaction in respect of certain household furniture for a shopkeeper. This transaction was in the form in which the company purchased the furniture from the shopkeeper, and then entered into a hire-purchase agreement with the purchaser. The E instalments in respect of this transaction fell in arrear, and the shopkeeper seized the furniture. It was found as a fact that the shopkeeper had a mandate from the company to seize the furniture on their behalf. The shopkeeper then sold the furniture to the defendants for cash, and the furniture was duly delivered. The plaintiffs then sued the defendants for the return of the furniture:—

Held: (i) the documents between the finance company and the F shopkeeper were neither absolute bills of sale ncr bills of sale by way of security.

(ii) the sale to the defendants was not protected by the Sale of Goods Act, 1893, s. 25, because the possession of the shopkeeper at the time of the sale was a possession as bailee, and not as a vendor of goods.

[EDITORIAL NOTE. The contentions under the Bills of Sale Acts do not seem G to have given any difficulty, and the case is mainly concerned with the construction of the Sale of Goods Act, 1893, s. 25. This section validates a sale by a vendor in possession of the goods sold although he may have made a previous contract of sale in respect of the same goods. The section requires that the vendor "continues or is in possession of the goods." The word "continues" seems clear, for it applies to the case where the vendor, having once sold the goods, continues in possession H and then sells them again. The difficulty which has arisen concerns the meaning of the words "or is in possession of the goods." The purpose of the insertion of these words is said to have been to provide for the case where the vendor at the time of the first sale was not in possession of the goods, but acquires possession of them subsequently. It is held, however, that the possession subsequently acquired must be a possession as absolute owner, or, at any rate, a possession giving a right to make a good title to a purchaser, and not a possession as bailee. It would seem that the words themselves are wide enough to include possession as a bailee, but there is authority for the narrower construction.

As to Disposition by Seller in Possession, see HALSBURY, Hailsham Edn., Vol. 29, pp. 112, 113, para. 136; and for Case, see DIGEST, Vol. 39, p. 535, No. 1461.]

Cases referred to:

(1) *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.*, [1934] 2 K.B. 305; Digest Supp.; 103 L.J.K.B. 613; 151 L.T. 396.

(2) *Mitchell* v. *Jones* (1905), 24 N.Z.L.R. 932; 39 Digest 535, case a.

(3) *Badische Anilin und Soda Fabrik* v. *Hickson*, [1906] A.C. 419; 39 Digest 492, *1090*; 75 L.J.Ch. 621; 95 L.T. 68.

(4) *Re Lovegrove, Ex p. Lovegrove & Co. (Sales), Ltd., Re Lovegrove, Ex p. Trustees*, [1935] Ch. 464; Digest Supp.; 104 L.J.Ch. 282; 152 L.T. 480.

Action for the return of certain specific furniture. The plaintiffs had agreed to finance the hire-purchase transactions of Goldstein, a furniture dealer, upon the following terms. Goldstein, upon obtaining a purchaser for any furniture, was to execute a sales letter and send it to the plaintiffs. The execution of this sales letter was to effect a binding and effectual sale of the furniture to the plaintiffs, who were then to enter into a hire-purchase agreement with the purchaser. Goldstein was then to obtain from a trade-protection association what was called a status report in respect of the purchaser. This report would, of course, disclose bankruptcies, judgments and the like which had been registered against the purchaser. If Goldstein failed to obtain a satisfactory status report, the transaction, so far as the plaintiffs were concerned, would fall through, and, under the agreement, the property would revest in Goldstein. If a satisfactory status report was obtained, the company would then pay to Goldstein 75 per cent. of the price of the goods (i.e., the hire-purchase price less an agreed discount). The actual collection of the instalments from the purchaser was made by Goldstein, who was to hand them on to the plaintiffs, except as to the last instalments, which were to be retained by him in respect of the other 25 per cent. of the price of the goods. For the purposes of this collection he was appointed an agent of the plaintiffs and was expressly made a *del credere* agent and guaranteed the payment of the instalments. The payment over of the instalments collected by Goldstein was secured by bills of exchange. If the purchaser elected to terminate his hire-purchase agreement in accordance with the terms thereof, or if possession of the goods was resumed by the plaintiffs, the goods were to be collected by Goldstein, but were to remain the property of the plaintiffs, and were to be dealt with as the plaintiffs should direct. The liability of the plaintiffs to pay the balance of the purchase money was not to be affected by such return or resumption of possession.

Sylvester Gates for the plaintiffs.

W. A. L. Raeburn for the defendants.

Gates: As soon as the dealer signed the sales letter, there was an appropriation of the goods to the contract and the property passed to the plaintiffs: *Badische Anilin und Soda Fabrik* v. *Hickson* (3). The agreement is not a bill of sale requiring registration, but is a document arising in the ordinary course of a business transaction, and is in the nature of an invoice: *Re Lovegrove* (4). The Sale of Goods Act, 1893, s. 28, does not apply to this transaction, since the possession of the furniture dealer was not that of a vendor but that of a bailee: *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.* (1).

Raeburn: The *Staffs Motor* case (1) is distinguishable. Under the Sale of Goods Act the right to possession is immaterial. It is the *de facto* possession of the person purporting to sell which protects the innocent purchaser. The burden of proof is on the plaintiffs and they have not proved how the goods came back into the possession of Goldstein. All that has been proved is that they were in his possession, that my clients bought from him, paid him for them and took delivery. As between two innocent parties the one who has made a fraud possible is the one to suffer. The sales letter required registration as a bill of sale. The trading agreement between Goldstein and the plaintiffs is not consistent with an out-and-out sale.

STABLE, J.: This case raises a short point, but one of considerable importance. The Olds Discount Co., Ltd., which is a finance company engaged in the activity of financing hire-purchase transactions, claims from Miss Krett and Samuel Krett the return of certain specific furniture.

The facts, proved or agreed, are as follows. The plaintiff company's title to the furniture was derived under an agreement, dated June 23, 1939, made between it and P. Goldstein of 70, High Street, Whitechapel, a sales latter, dated July 13, 1939, and—although, strictly speaking, it is not a document of title, it is so closely connected with the transaction that I had better refer to it now—a hire-purchase agreement, dated July 13, 1939, made between Goldstein, as agent for the plaintiff company, and one Morris Frankenstein. The arrangement between the plaintiff company and Goldstein is defined in this agreement of June 23, 1939, which I will call the code agreement. That provides in substance that the plaintiffs are to buy goods for the purpose of hiring them out under hire-purchase agreements, and, whenever Goldstein, who is described as the plaintiffs' agent, can negotiate a hire-purchase agreement with a satisfactory customer, the plaintiff company buy the goods from the agent on the terms set out in the code agreement, and thereupon the agent as agent enters into a hire-purchase agreement with the particular customer. It is to be observed that none of those documents impose any obligation on Goldstein, the agent, to retake possession of the property the subject-matter of the dual transaction, nor, indeed, do they contain any express authority from the company to retake possession of the furniture from the customer if the customer makes default. Nevertheless, cl. 13 of the code agreement contemplates that the agent will—or, perhaps, may—retake possession, and I am satisfied on the evidence of Leach, the plaintiffs' inspector, that arising out of the course of dealing there was an implied authority to the agent to look after his principals' interests, and, when he found that a particular customer was unable to pay the instalments of hire, to get the furniture back in safe custody. There was connected with that mandate, however, an obligation on the agent to notify the company of what he had done. If, indeed, there was no obligation on the agent to inform the company of what he did, it was to his interest to do so, because the agent's rights were adversely affected if the notice was not given.

It appears that Frankenstein, who was one of those who had acquired some right to this furniture under a hire-purchase agreement made in the way I have indicated, proved to be an unsatisfactory customer, and on Nov. 18, 1939, Goldstein wrote to the plaintiff company as follows:

> Owing to certain customers being unable to make any further payments, we shall be obliged to repossess their goods at once.

There is a postscript in which he says:

> Shall be calling at your London office on Tuesday, Nov. 21, 1939.

I do not know what happened at the interview at the London office, but it is plain from that letter that Goldstein was telling the company that he was going to take possession of the goods on their behalf, and thereafter the company acquiesced in what Goldstein did. Thus Goldstein, who had originally been in possession of the goods as vendor for the company, resumed and retained possession of the goods as agent for the company in the exercise of a mandate which was to be implied from the course of business, if it was not, as I think it was, an express mandate derived from the letter of Nov. 18, 1939, and the action which the company took consequent on the receipt of that letter. What they did was to send round their inspector, Leach. Leach seeing that Goldstein had the furniture, the company made no sort of complaint or protest, and there the furniture remained until towards the end of January. On Jan. 18, Leach, and one Roberts, who was a prospective purchaser, inspected this furniture at Goldstein's shop. On Jan 19, the plaintiffs' solicitor wrote to Goldstein and demanded back possession of the furniture for the purpose of delivering it to Roberts, who had by then agreed to buy, and it is plain that, as from the receipt of that letter, Goldstein had no right at all as against the company to hold the furniture. What Goldstein did was this. On Feb. 1, as is set out in an affidavit, he sold these goods, and I think some other goods as well, to the unfortunate defendants, Mr. Krett and Miss Krett. Miss Krett was going to be married, and she was providing herself, and her father was providing her, with some furniture to furnish a house. They saw these goods at Goldstein's shop, bought them, or purported to buy them, and paid for them, and it is common ground that they took them in perfect good faith, without any notice or knowledge of any antecedent transaction in connection with the goods, or that there was any flaw whatever in Goldstein's title to sell.

The defendants are being sued by the plaintiff company for delivery up of the goods. A defence is raised, first of all, under the Bills of Sale Acts, 1878 to 1882, and, secondly, under the Sale of Goods Act, 1893, A
s. 25. As regards the Bills of Sale Acts, it is conceded that, if the initial transaction between Goldstein and the plaintiffs was an out-and-out sale, Krett and Miss Krett do not come within the limited class of persons for whose benefit the Act of 1878 was passed. As has been pointed out many times, that Act is an Act, broadly speaking, for the protection B
of creditors. It is plain that, if the transaction is a mortgage of chattels, none of the requirements of the Bills of Sale Act, 1882, has been complied with, and the plaintiffs have no sort of title to the goods. The first question is whether this is, in the first instance, a mortgage of chattels or an out-and-out sale as between Goldstein and the plaintiffs. C
In my judgment, there can be no doubt whatever, when one looks at the documents and the authorities, that this was an out-and-out sale by Goldstein to the plaintiff company. I arrive at that conclusion somewhat regretfully, but it is much too late in the day for anybody to say that such transactions are in reality and substance mortgages. The D
day for that, if there ever was a day for it, has passed long ago. It seems to me that the code agreement plus the sales letter constitute an out-and-out sale, and, in fairness to these people, it seems to me that it is a much more out-and-out sale than a great many other transactions of a similar kind which I have seen, where it has been held E
that the sale was out-and-out.

That leaves counsel for the defendants with the defence under the Sale of Goods Act, 1893, s. 25. As regards that section, with some regret, I am satisfied that I am precluded by authority from deciding in favour of the defendants. The section provides that, where a F
person, having sold goods, continues to be, or is, in possession of the goods, the transfer of those goods under a sale to a person receiving them in good faith and without notice of a previous sale shall give a good title. Of course, if one takes the words in their widest sense—" Where a person having sold goods is in possession of the goods, the G
delivery by that person to a *bona fide* purchaser shall give that purchaser a good title "—those words are wide enough to protect the defendants. I say that it is a matter of regret that this section does not protect an innocent member of the public who has gone into that shop and bought those goods, but I think that the matter is covered by the authority of H
Staffs Motor Guarantee, Ltd. v. *British Wagon Co., Ltd.* (1). That was a case in which a finance company bought property from a dealer with the object of putting through a particular hire-purchase transaction, but the hire-purchase transaction which was contemplated fell to the ground. Thereafter, the finance company which purchased the goods entered into

a fresh contract with the person from whom the goods had been purchased, hiring back their property to him, and, while he was in possession of the goods under that entirely independent contract, he disposed of the goods to an innocent third person. MACKINNON, J., held in that case that that innocent person was not protected by the section. There is a distinction between that case and this, because in that case the possession was a possession which was derived by virtue of a transaction which was not contemplated at the time when the original contract for sale was made. In this case, although the possession on and antecedent to Feb. 1 was not a possession that Goldstein obtained by virtue of any right contained in the initial transaction with the plaintiffs, or by virtue of any obligation imposed on him by that initial transaction, I think that, in the absence of an express mandate to the agent in the documents, there is to be derived from the documents and the course of dealing a mandate to the dealer to look after his principals' interests, and to get the furniture back if the hirer was in default. Thus, the resumption of the possession in this case was not quite such an independent matter as it was in *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.* (1), but, although there is that distinction, it seems to me to be a distinction without a difference, because what MACKINNON, J., decided was that the possession referred to in the section must be a possession arising out of the fact that the person who has possession is the seller of the goods.

In this case, when Goldstein sold the goods to the plaintiffs, the goods passed out of his possession as seller completely, and passed to the possession of Frankenstein, who had hired the goods from the purchasers, the plaintiffs. The possession which Goldstein held up to Jan. 19 was a possession arising out of a mandate from the plaintiffs simply to act as their agent to hold the property as their bailee. It was a mere accident that the agent to whom that mandate was given happened to be the person by whom the goods had originally been sold. It is plain that after Jan. 19, or, rather, after Jan. 22, which was the time given within which Goldstein was to deliver the goods over to Roberts, Goldstein had no right to remain in possession of the goods. The bailment of the goods to him as agent was determined, and, as from Jan. 22 at the latest, he was in possession of the goods under no shadow of a claim of right, and most certainly not by virtue of the fact that at one time or another he had sold them to the plaintiffs. That being so, it seems to me that the matter is exactly covered by the principle in *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.* (1). MACKINNON, J., at pp. 315, 316, quoted the following passage from the judgment of STOUT, C.J., in a New Zealand decision (*Mitchell* v. *Jones* (2), at p. 935):

> It is contended by Mr. Levi that these words mean that if the seller of the goods delivers them to a buyer and the buyer accepts them, and afterwards the seller gets them back on a new contract in the nature of a bailment, the seller can sell the goods to a third person and give a good title to them, provided the third person

> acts *bona fide* in the transaction. In my opinion that is not the meaning of the section. The meaning is—first, that if a person sells goods and continues in possession, even though he has made a valid contract of sale, provided that he has not delivered them, he may to a *bona fide* buyer make a good title ; and, secondly, the putting-in of the words "or is in possession of the goods" was meant to apply to a case of this character : If a vendor had not the goods when he sold them, but they came into his possession afterwards, then he would have possession of the goods, and if he sold them to a *bona fide* purchaser he could make a good title to them. He would be in the same position as if he had continued in possession of the goods when he made his first sale. In such a case as that he could make a good title to a *bona fide* purchaser. That is not this case. In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer. The relationship, therefore, of buyer and seller between them was at an end. It is true that the seller got possession of the goods again, but not as a seller. He got the goods the second time as the bailee of the buyer, and as the bailee he had no warrant, in my opinion, to sell the goods again, nor could he make a good title to them to even a *bona fide* purchaser.

Referring to those words, MacKinnon, J., then says:

> I think that that reasoning is sound, that the same principle ought to apply under the words of the identical provision of the English Act, and that the decision in that case applies to the facts of this case.

Then he expresses the same regret as I have felt for the innocent people who have been apparently defrauded by the irregular transactions of the dealer.

There is just one matter to which I ought to allude. In a most careful argument, counsel for the defendants emphasised the fact that in the present case the relationship of buyer and seller is still, as it were, alive, because the plaintiffs, who bought the goods, have not completed the payment for them. The ultimate balance of the purchase price is not payable until some future date, and that obligation has not at the moment matured. That is right, but it is conceded, or, if not conceded, in my view it is plain, that, as between Goldstein and the company, he could not assert any unpaid vendor's lien on these goods. He could not assert any right to hold the goods because there was a balance of the purchase price unpaid. His lien went the moment he made delivery of the goods to the person who hired them from the plaintiff company. The relationship of buyer and seller still exists to the extent, and to the extent only, that in fact the plaintiffs have bought these goods from Goldstein, and the due date for the payment of the balance of the purchase price has not arrived. However, when one looks, as one should, at the question of possession, it is plain that the possession here is a possession derived from a bailment which is wholly distinct from, and independent of, the relationship of buyer and seller. In the result. I must hold that the claim succeeds, and there will be judgment for the plaintiffs against the defendants.

Solicitors: *Sidney Pearlman* (for the plaintiffs) ; *W. Timothy Donovan* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

PARR *v.* RICHARD HAWORTH & CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Luxmoore, L.JJ.), **April 12, 19, May 9, 1940.]**

Workmen's Compensation—Partial incapacity—Loss of finger—Workman employed after accident at former work for 13 *years at former rate of wages —Illness not due to employment preventing workman from working—No evidence of seeking to obtain work—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 9 (1).

In 1926, a workman employed in a cotton mill met with an accident in the course of his employment, and suffered the loss of the index finger of his right hand. After about 12 weeks, he resumed his former employment at his pre-accident rate of wages. In 1939, he developed chest trouble, and was unable to continue working in a cotton mill. He then claimed compensation for partial incapacity due to the accident. No evidence that the workman had been unable to obtain employment could be given, as his illness had prevented his seeking work :—

HELD (LUXMOORE, L.J., *dissenting*): it was competent for the county court judge to act upon the evidence of the loss of the finger, and to hold as a fact that partial incapacity existed.

[**EDITORIAL NOTE.** Where a workman has lost a finger or an eye and has returned to his former occupation at full wages, it has always been considered to be a question of fact whether or not there is partial incapacity. If he is to receive compensation in such a case, evidence must be adduced to prove that the ordinary employer in the industry in which he has been working would not pay him full wages. The peculiarity of the present case is that, owing to chest trouble, the workman will not be able to work again in a cotton mill, and, at the time of the application for compensation, had not been able, by reason of his illness, to seek any employment. In these circumstances, the court have differed as to whether an award could be made or whether there must in all cases be evidence that the workman has sought employment and has not been able to procure it at his former rate of wages.

AS TO PARTIAL INCAPACITY WHERE WORKMAN TAKEN BACK AT OLD RATE OF WAGES, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 300, 301; and FOR CASES, see DIGEST, Vol. 34, pp. 406, 407, Nos. 3314-3321.]

Cases referred to:

(1) *McCann* v. *Scottish Co-operative Laundry Assocn, Ltd.*, [1936] 1 All E.R. 475; Digest Supp.; 105 L.J.P.C. 58; 154 L.T. 503; 29 B.W.C.C. 1.

(2) *Ball* v. *Hunt (William) & Sons, Ltd.*, [1912] A.C. 496; 34 Digest 395, *3228*; 81 L.J.K.B. 782; 106 L.T. 911; 5 B.W.C.C. 459.

(3) *O'Neill* v. *Ford Shapland & Co., Ltd.* (1932), 25 B.W.C.C. 666; Digest Supp.

(4) *Athey* v. *United Steel Co., Ltd.* (1935), 28 B.W.C.C. 435; Digest Supp.

(5) *Ray* v. *Vickers, Ltd.* (1923), 16 B.W.C.C. 200; 34 Digest 407, *3317*.

(6) *Blades* v. *Wool Exchange & General Investments, Ltd.* (1937), 30 B.W.C.C. 395; Digest Supp.

(7) *Stowell* v. *Ellerman Lines, Ltd.* (1923), 128 L.T. 823; 34 Digest 345, *2787*; 16 B.W.C.C. 46.

(8) *Lomax* v. *Sutton Heath & Lea Green Collieries, Ltd.* (1926), 135 L.T. 564; 34 Digest 346, *2793*; 19 B.W.C.C. 301.

(9) *Owens* v. *Llay Main Collieries, Ltd.* (1932), 25 B.W.C.C. 573; Digest Supp.

(10) *Hughes* v. *Penmaenmawr & Welsh Granite Co., Ltd.* (1933), 148 L.T. 485; Digest Supp.; 26 B.W.C.C. 99.

APPEAL by the employers, the respondents in the arbitration, from an award of His Honour Judge Crosthwaite at the Salford County Court, dated Jan. 18, 1940. The facts are fully stated in the judgments.

F. A. Sellers, K.C., and *B. Ormerod* for the appellants.

Robert Lambert for the respondent.

Sellers, K.C.: The test is not disability. It is incapacity to earn wages. In the present case, there was no evidence that the workman could not earn his former wages, because there was no evidence that he had endeavoured to obtain employment. The workman has done heavy labouring work for over 13 years, and that fact negatives the suggestion that his earning capacity has been diminished. [Counsel referred to *Athey* v. *United Steel Co., Ltd.* (4).]

Lambert: The county court judge was entitled to rely upon the decision of the Court of Appeal in *Ray* v. *Vickers, Ltd.* (5). He was entitled to use his own knowledge of the labour market, and to look at the workman's hand, and to draw his own conclusion from the visual evidence: *Blades* v. *Wool Exchange & General Investments, Ltd.* (6). It cannot be said that the man's right to compensation had gone because he had earned his pre-accident rates of wages at his former employment: *McCann* v. *Scottish Co-operative Laundry Assocn., Ltd.* (1). In the present case, the position is exactly the same as in *Stowell* v. *Ellerman Lines, Ltd.* (7). A man who has lost the first finger of his right hand must have suffered a loss of grip. *Lomax* v. *Sutton Heath & Lea Green Collieries, Ltd.* (8) was decided under the 1906 Act, and is overruled by *McCann* v. *Scottish Co-operative Laundry Assocn., Ltd.* (1).

Sellers, K.C., in reply: It has been established that the respondent is not suffering a partial incapacity. He has a physical disability, but many workmen have awards made against them and yet have some disability. That is not a matter with which the Workmen's Compensation Act deals, although there may be a claim for damages at common law. The employers could have taken proceedings to terminate liability at any time during the 12 or 13 years the man has been working for them. In order to bring himself within the principle of *Ball* v. *Hunt (William) & Sons, Ltd.* (2), the workman must give some evidence. Sect. 9 (1) of the Act does not give compensation unless there is a loss of earning capacity. On the question of the judge using his local knowledge, the judge could not know whether or not the loss of the workman's finger would affect his earning capacity. [Counsel referred to *McCann* v. *Scottish Co-operative Laundry Assocn., Ltd.* (1), *Owens* v. *Llay Main Collieries, Ltd.* (9), *Hughes* v. *Penmaenmawr & Welsh Granite Co., Ltd.* (10), *Stowell* v. *Ellerman Lines, Ltd.* (7) and *Lomax* v. *Sutton Heath & Lea Green Collieries, Ltd.* (8).]

Clauson, L.J. [delivering the judgment of Sir Wilfrid Greene, M.R., and Clauson, L.J.]: In this case, the county court judge has made no error in law, in our judgment, and, in our opinion, it has not been established that there is any ground for interfering with the findings of fact implicit in his award. In June, 1926, a workman suffered the loss of the index finger of his right hand in circumstances which entitled him to the benefit of the Workmen's Compensation Act, 1925. He appears to have been paid compensation by the employers for a short period, and he then returned to work at his pre-accident job at his pre-accident wage. For causes in no way connected with the accident, since Sept., 1939, he has been unable to work at his former job. He claims compensation for partial incapacity. He is not claiming the benefit of sect. 9 (4) of the Act, as amended in 1931.

The county court judge, referring to the opinions given in *McCann* v. *Scottish Co-operative Laundry Assocn., Ltd.* (1), held that, the man being partially incapacitated, neither the fact that for many years he had earned his pre-accident wage nor the fact that his then inability to earn was due to a cause in no way connected with the accident relieved him from the duty of assessing compensation on the footing of partial disability. It was somewhat faintly argued that the county court judge took a wrong view of the law, but, in our judgment, the opinions in *McCann's* case (1) make the law quite clear, and the county court judge's decision cannot be impugned in point of law. It was suggested, however, that there was no evidence on which the county court judge could hold that the man was partially incapacitated. The evidence was the fact that the man had lost the index finger of his right hand. No evidence was tendered by the employers to suggest that this was not partial incapacity. In our view, it was well within the county court judge's rights to act on this evidence, such as it was, and to hold as a fact that partial incapacity existed. It was argued that the fact that the workman had for some 13 years been able to do his old work was conclusive evidence that the loss of the finger did not amount to partial incapacity. We cannot agree. The fact that he adapted himself to one type of work does not necessarily mean that he could adapt himself to a different type of work, or could so adapt himself without initial difficulties. Moreover, in some types of work—for example, mechanical work—the loss of the finger must necessarily be a handicap, and it might well take some time before that handicap could be overcome. The mere fact that a man requires time to adapt himself shows conclusively that he is partially incapacitated.

It was further suggested that the judge had no sufficient material before him to fix the figure of compensation as he did. It appears to us that the onus was on the employers to establish what figure, less than the permitted maximum in case of total incapacity, was appropriate to the circumstances, and, in the absence of such evidence, the county court judge had no option save to rely (as he apparently did) on his own common sense and experience and knowledge of local conditions in arriving at a figure which appeared to him, in the circumstances, to be proper. In our judgment, the appeal fails, and should be dismissed with costs.

Luxmoore, L.J. [read by Clauson, L.J.]: I respectfully agree with my brethren that there has been no error in law on the part of the county court judge in arriving at his decision in this case, but, in my judgment, there was no evidence before him which entitled him to find as a fact that the workman's earning capacity or chance of finding employment in the open labour market was still injuriously affected by the accident which he suffered in June, 1926. The facts proved or admitted before the county court judge are as follow. In June, 1926, the workman lost the forefinger of his right hand, owing to an accident arising out of and in the course of his employment by the employers as a stripper and grinder in their cotton mill—an employment of a semi-skilled character involving a considerable amount of heavy manual work. After an absence of some 3 months, the workman returned to his former employment, receiving the same wages as those which he earned before the accident. He had certain difficulties at the start, but he ultimately overcame them, so that the loss of his finger caused him no inconvenience in his old employment. He continued there for some 13 years after the accident down to a date in Sept., 1939, when he developed byssinosis, a species of asthma, and for this, and for no other reason, on his doctor's advice he gave up his work at the cotton mill. On Dec. 2, 1939, while he was still suffering from byssinosis, the workman instituted arbitration proceedings under the Workmen's Compensation Act, 1925, on the ground that he was suffering from permanent partial incapacity for work. Owing to the continuation of the byssinosis, neither at the date of his application nor before the hearing of the arbitration proceedings had the workman made any attempt to obtain other work. At the hearing before the county court judge, the only evidence was that given by the workman. He demonstrated to the judge that he had lost his forefinger, and stated the facts to which I have already referred. He also stated that he was anxious to obtain outside labouring work. In addition to this evidence, it was admitted that, but for the incidence of byssinosis, the workman could have continued in his old employment.

The workman's claim was based on sect. 9 (1) of the Act. His claim under sect. 9 (4) was abandoned by his counsel at the outset of the hearing, for the obvious reason that the workman was not in a position to prove that, though he had recovered from the injury suffered in 1926, he had failed to obtain employment owing to the continuing effects of the injury, or in consequence wholly or mainly of that injury. The basis of the county court judge's decision is to be found in this statement at the beginning of his judgment:

> In June, 1926, Parr [the workman] suffered an accident as the result of which he lost his first finger of his right hand, a highly important finger, if there be, as I think there are, degrees of importance among fingers. In my view, "incapacity for work results from injury" (sect. 9 (1)), and that incapacity is, of course, permanent. If words mean anything, we are not provided with unnecessary limbs.

I agree that, in order to obtain compensation under the Act, a workman must be incapacitated for work, and that such incapacity must

result from injury, but I am unable to agree that every injury suffered by a workman in the course of and arising out of his employment must necessarily result either in total or in partial incapacity, or that, if it does so result, that total or partial incapacity must be permanent, even though there be permanent visible evidence of the injury in the work-
A man's person. Obviously, if a workman loses a limb, there is permanent incapacity, total or partial, but I do not think that the loss of a finger joint or toe joint, or even of a toe or finger, must of necessity result in permanent partial incapacity. The question in such a case must be one of fact, which cannot be proved, as in the case of the loss of a hand
B or an arm, solely by the exhibition of the mutilated member.

It seems to me that the judge has stated that there was permanent partial incapacity solely because of the loss of the forefinger, and apparently in disregard of the fact that for over 13 years the workman had been able to carry on his work without inconvenience. It was argued
C that, in coming to a conclusion that the loss of a finger constituted a permanent partial incapacity, the judge was entitled to use his common sense and experience and local knowledge. I am quite unable to appreciate how any of these most useful and necessary equipments can be invoked solely for the purpose of finding incapacity but cannot with
D at least equal force be invoked for the purpose of arriving at the opposite conclusion—namely, that the partial incapacity is not permanent—for it must be within the experience of the majority of employers of labour that men who have lost a finger in an accident suffered many years ago are as well able to do the generality of work falling to be done by outside
E labourers as are those who have suffered no such loss. Further, it must be remembered that the onus of proving that there is incapacity resulting from injury is on the workman.

The conclusion at which I have arrived is that the county court judge had no evidence on which to find that the workman was suffering from
F permanent partial incapacity. In coming to this conclusion, I am not consciously ignoring any of the decisions to which we were referred during the argument, for I accept them in their entirety. I would point out, however, that in *Ball* v. *Hunt (William) & Sons, Ltd.* (2) there was direct evidence that the workman whose blind eye had been injured by
G an accident for which he was entitled to be compensated under the Workmen's Compensation Acts then in force was, although able to do his pre-accident work, prevented by reason of that accident from obtaining any work on account of his disfigurement, while in *McCann* v. *Scottish Co-operative Laundry Assocn., Ltd.* (1) there was clear evidence
H of the existence of partial incapacity from the accident at the date of the incapacity from the illness, in that at the date of the illness the female workman was capable of doing only light work of a special kind, and was suffering, not only from the loss of her finger, but also from weakness and loss of flexibility of her right hand which was "probably permanent," and also from some weakness of her right arm.

It is difficult to understand on what basis the county court judge fixed the compensation to be paid to the workman in the present case, but I have not taken this matter into consideration in arriving at my conclusion, for I agree that, if there were evidence on which the judge was entitled to find permanent partial disablement, it would be his duty to fix the rate of compensation on such material as was available, in the absence of any evidence on behalf of the employers to establish the appropriate figure. As I have already stated, in my judgment there was no evidence before the judge entitling him to find partial incapacity, whether permanent or temporary, in the present case. It may well be, however, that, when the workman seeks to obtain work, or, having obtained work, attempts to do it, evidence may be forthcoming sufficient to establish that there is in fact some partial incapacity resulting from the loss of the forefinger. This was pointed out to counsel for the appellants during the course of his argument, and he then offered to submit to the insertion in the order, in the event of his appeal to this court being successful, the words "without prejudice to the right of the applicant to make further application for compensation, declaration of liability, or otherwise," in accordance with the form adopted in *O'Neill* v. *Ford Shapland & Co., Ltd.* (3): *Athey* v. *United Steel Co., Ltd.* (4). For the reasons I have stated, I would allow the appeal, and order the award to be set aside and an award made in favour of the employers, inserting in it the words I have quoted from *O'Neill's* case (3). I would also give the costs both of the appeal and of the arbitration to the employers.

Appeal dismissed with costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the appellants); *Gibson & Weldon*, agents for *Ascroft, Maw, Shimeld & Clayton*, Oldham (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BANKS *v.* RIPLEY.

[CHANCERY DIVISION (Morton, J.), **May 2, 3, 6, 1940.**]

Settlements—Words of limitation absent—Succeeding clause with gift over and resulting trust to settlor—Rectification—No evidence extraneous to settlement available—Power of court to rectify.

By a settlement, dated June 18, 1873, and containing no recitals, the settlor conveyed certain freehold hereditaments to one K. to hold the same in trust for his daughter and the children of her intended marriage. The first part of the settlement contained no words of limitation, and, on the authority of *Re Bostock's Settlement, Norrish* v. *Bostock* (1), conferred no more than a life interest upon the children of the settlor's daughter. There followed, however, a clause which provided as follows: "in case there shall not be any children or child of the said marriage . . . the said trustee shall hold the said hereditaments to the use of the right heirs of the settlor." There was one child of the marriage, the plaintiff in the present case, and, the settlor's daughter having died in 1901, the plaintiff became entitled to the hereditaments under the settlement. Thereafter, it was discovered that the settlement, upon its proper construction, conferred only a life interest upon the plaintiff, whereupon the present action was brought with a view to obtaining a rectification of the settlement by inserting the words "his or her heirs" after the clause conferring a beneficial interest upon the children of the marriage. The settlement not containing any recital, and there being no evidence extraneous to the settlement itself as to the settlor's intention, the question arose whether the court had power to rectify the settlement, and, if so, whether the settlement itself contained any indication sufficient to justify such rectification:—

HELD: (i) the court had power to rectify the settlement, in spite of the absence of extraneous evidence as to the settlor's intention.

(ii) as there was a clear indication that the settlor appreciated the difference between a life interest and an absolute interest, and as, moreover, the form of the gift over was clearly such as to indicate the settlor's intention to confer more than a life interest upon the issue of his daughter's marriage, the settlement ought to be rectified accordingly.

[**EDITORIAL NOTE.** The only question in the present case is whether the deed itself affords sufficient evidence of the intention of the settlor to enable the court to rectify it on the ground of mistake. On this question, the judge has come to the conclusion that, on a perusal of the document itself, from first to last it embodies an intention that the children of the marriage, on attainment of the age of 21 years, or, being females, on marriage, are to take an absolute interest.

AS TO ABSENCE OF EVIDENCE OF INTENTION APART FROM DEED, see HALSBURY, Hailsham Edn., Vol. 23, pp. 158, 159, para. 230; and FOR CASES, see DIGEST, Vol. 35, pp. 137-142, Nos. 355-407.]

Cases referred to:

(1) *Re Bostock's Settlement, Norrish* v. *Bostock*, [1921] 2 Ch. 469; 40 Digest 635, *1746*; 91 L.J.Ch. 17; 126 L.T. 145.

(2) *Uvedale* v. *Halfpenny* (1723), 2 P.Wms. 151; 40 Digest 541, *843*.

(3) *Fitzgerald* v. *Fitzgerald*, [1902] 1 I.R. 477; 40 Digest 539, case *b*.

(4) *Re Davis's Estate*, [1912] 1 I.R. 516; 40 Digest 459, case *g*.

(5) *Re Bird's Trusts* (1876), 3 Ch.D. 214; 40 Digest 539, *818*.

(6) *Fowler* v. *Fowler* (1859), 4 De G. & J. 250; 35 Digest 134, *340*.

(7) *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*) (1784), 1 Bro.C.C. 338; 35 Digest 137, *356*; *on appeal sub nom. Inchiquin* (*Earl*) v. *Fitzmaurice* (1785), 5 Bro.Parl.Cas. 166.

(8) *Townshend (Marquis)* v. *Stangroom, Stangroom* v. *Townshend (Marquis)* (1801), 6 Ves. 328; 35 Digest 134, *336*.

(9) *Re Whiston's Settlement, Lovatt* v. *Williamson*, [1894] 1 Ch. 661; 40 Digest 635, *1745*; 63 L.J.Ch. 273; 70 L.T. 681.

(10) *Re Tringham's Trusts, Tringham* v. *Greenhill*, [1904] 2 Ch. 487; 40 Digest 635. *1749*; 73 L.J.Ch 693; 91 L.T. 370.

(11) *Re Oliver's Settlement, Evered* v. *Leigh*, [1905] 1 Ch. 191; 40 Digest 636, *1750*; 74 L.J.Ch. 62.

Action for rectification of a settlement, dated June 18, 1873. No evidence extraneous to the settlement itself was adduced regarding the settlor's intention. The facts and arguments are fully set out in the judgment.

R. H. Hodge for the plaintiff.

J. A. Wolfe (for *E. Milner Holland* on war service) for the adult defendants.

L. R. Norris (for *B. S. Tatham* on war service) for the infant defendants.

Morton, J.: On June 18, 1873, a settlement was made in contemplation of a marriage, which was shortly after solemnised, between William Lewins and Eliza Culff. The settlor was Samuel Culff, the father of Eliza Culff, and the operative part of the document, which contains no recital at all, begins as follows:

> . . . in contemplation of a marriage between the said Eliza Culff and the said William Lewins the said Samuel Culff doth grant and convey unto the said William King and his heirs all the freehold hereditaments described in the schedule hereto with their actual and reputed appurtenances and all the estate and interest of the said Samuel Culff therein . . .

The hereditaments described in the schedule were a piece of land at Lower Clapton, in the Parish of St. John Hackney, in the county of Middlesex, together with two messuages erected on that land and known as No. 84 and No. 86, Elderfield Road aforesaid. The settlement continues as follows:

> . . . to hold the said hereditaments and premises unto the said William King and his heirs to the uses upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same (that is to say) to the use of the said Samuel Culff and his heirs until the solemnisation of the said intended marriage and from and after the solemnisation thereof to the use of the said William King and his heirs and assigns upon trust to receive and pay the income therefrom unto the said Eliza Culff (whose receipt alone shall be a sufficient discharge for the same) during her life for her separate and inalienable use during any coverture and upon the decease of the said Eliza Culff the said William King shall stand possessed of the said hereditaments in trust for all or such one or more of the children of the said intended marriage in such shares if more than one and in such manner as the said Eliza Culff shall by any deed or deeds with or without power of revocation and new appointment or by her will or any codicil thereto and whether she shall be under coverture or not appoint [in fact no appointment was made by Eliza Culff, afterwards Eliza Lewins] and in default of such appointment and so far as any such appointment shall not extend in trust for all the children of the said intended marriage who being a son or sons shall attain the age of 21 years or being a daughter or daughters attain that age or marry in equal shares and if there be only one such child the whole to be in trust for that one child.

In the gift to the children there are no words of limitation, and it is clear, having regard to *Re Bostock's Settlement, Norrish* v. *Bostock* (1), that the court could not, as a matter of construction, construe those words as conferring more than a life interest upon any child or children. Then the deed proceeds as follows:

> . . . but in case there shall not be any children or child of the said intended marriage who being a son shall live to attain the age of 21 years or being a daughter who shall attain that age or marry then the said William King shall hold the said hereditaments to the use of the right heirs of the said Samuel Culff . . .

Then follow certain provisions, to which I shall return hereafter, which, in my view, have some bearing upon the case.

There was one child only of the intended marriage who attained the age of 21, or, being a daughter, had married, and that child was the plaintiff in this action, who is now Mrs. Banks. Mrs. Banks' mother, Eliza Lewins, afterwards Eliza Lawrence, who was, as appears, the tenant for life under the settlement, died on Aug. 15, 1901, and the plaintiff then became entitled in possession under the settlement to the two houses which had been settled. After some time, it was discovered, and I think only recently discovered, by her present solicitors that the settlement, as a matter of construction, conferred upon the plaintiff only a life interest, and this action was brought for the purpose of obtaining rectification of the settlement. Counsel for the plaintiff now asks that the settlement may be rectified by inserting the words "and their heirs" between the words "attain that age or marry" and the words "in equal shares," and also by inserting the words "his or her heirs" after the words "in trust for that one child." It is only the latter alteration which is material to the plaintiff's point of view, but counsel for the plaintiff concedes that, logically, if there is rectification in one place, there has to be rectification in both places.

The defendants to the action are the persons who would be interested in the property if there were a resulting trust to Samuel Culff on the death of the plaintiff. It is quite plain that the gift over which is contained in the settlement in favour of the right heirs of Samuel Culff cannot take effect, because in fact there has been a child of the marriage who attained the age of 21 years, but, if the plaintiff takes only a life interest under the settlement, then the result would clearly be that there was a resulting trust. The adult defendants all appear by the same counsel, who has informed the court that so far as his clients have a beneficial interest, they will be willing that an order for rectification should be made, but, as some of his clients appear in a fiduciary capacity, it is, of course, his duty to argue against rectification. Counsel for the infant defendants was, of course, bound to argue against rectification.

The only oral evidence which was called before this court was the evidence of the plaintiff herself and the evidence of Robert William Ripley, a partner in the firm of solicitors now acting for the plaintiff. The plaintiff told me that her mother, being tenant for life under the settlement, mentioned the settlement to the plaintiff after the plaintiff's father's death, and told the plaintiff that the two houses "must" or "would" come to her direct, and the plaintiff has given some evidence as to what she understood her mother to mean by that. I have the gravest doubt as to whether the evidence of the plaintiff was admissible at all. I do not doubt for one moment that it was given with truth and sincerity, but for the purposes of this case, I ought not to attach any weight to it as evidence of intention of the parties to this document, A which was executed in 1873, when, of course, the plaintiff was not in existence.

Ripley's evidence is to this effect. His firm have made inquiries in regard to one Rogers, a solicitor, the signature of Samuel Culff in the settlement having been witnessed in the presence of Rogers' clerk. B Ripley ascertained that Rogers' practice was taken over a long time ago by one Tiddeman, and so he has inquired of Tiddeman whether he had any documents relating to this marriage settlement, and, to quote Ripley's evidence, it has proved

C

> . . . quite impossible, after research, to find any documents which have any bearing upon the intention of the parties to this settlement, other than the settlement itself. No instructions to the solicitor or other documents can be found.

In those circumstances, two questions arise for my decision. First of all, is there jurisdiction to rectify this document on the evidence afforded simply by a perusal of the document itself, there being, as I think, no D other relevant or admissible evidence available. The second question is whether or not, if there is such a jurisdiction, this document affords in itself sufficient evidence of the intention on the part of the parties to it that the fee simple of these houses should pass to the children or child of the marriage. As to the first question, counsel for the plaintiff E has referred me to *Uvedale* v. *Halfpenny* (2), and also to two Irish cases, the first being *Fitzgerald* v. *Fitzgerald* (3) and the other *Re Davis's Estates* (4). He also referred me to *Re Bird's Trusts* (5), but he pointed out very rightly that it did appear from the report of *Re Bird's Trusts* (5) that affidavit evidence showing the intention of the parties F was before the court, although the report unfortunately does not state what was the nature of that evidence, beyond stating briefly that it was evidence showing the intention of the parties.

Counsel for the defendants intimated at an early stage in the argument that, having regard to *Uvedale* v. *Halfpenny* (2), *Fitzgerald* v. *Fitzgerald* (3) and *Re Davis's Estate* (4), they could not contend that there G was no jurisdiction in the court to rectify the document on the evidence afforded by a perusal of the document itself, but they submitted that, as to the second question, the evidence afforded by the document in this case was not sufficient to enable the court to ascertain that there H had been a mistake, and the precise nature of the mistake. They referred me to the well-known passage in the judgment of LORD CHELMSFORD, L.C., in *Fowler* v. *Fowler* (6), at pp. 264, 265:

> The power which the court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention

> of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord Thurlow, L.C.'s, language [in *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*) (7)] is very strong on this subject; he says [p. 341], "the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence"; . . . And this expression of Lord Thurlow, L.C., is mentioned by Lord Eldon in *Townshend* (*Marquis*) v. *Stangroom* (8), without disapprobation. If, however, Lord Thurlow, L.C., used the word "irrefragable," in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the court is virtually making a new written agreement.

Let us now turn back to the settlement of June 18, 1873, and consider, first of all, apart from the authorities as to the effect of the documents in some respects similar to that document, whether, on a perusal of that document, there is left in my mind any fair or reasonable doubt that it does not embody the final intention of the parties. In the first place, it is to be observed that the life interest was given, and I should perhaps deal with both the indications and the intentions in the order in which they appear, and not in the order which I consider to be their importance. In the first instance, it is to be observed that there is a clear gift of a life interest to Eliza Culff during her life, so that the settlor was well aware of how a life interest ought to be given, and, when he wished to give a life interest, he could give it in plain terms, and did give it in plain terms. In the second place, I observe that the power of appointment which is given to Eliza Culff is clearly wide enough to cover an appointment of the fee simple to a child or children of the intended marriage. In the third place, there is the term of the gift itself, which, as I have said, can, as a matter of construction, carry a life interest. Not only does it carry a life interest, but also one cannot leave out all note of the fact that it cannot carry more than a life interest because of certain rules by which the court is bound, and the rules, which have been plainly pointed out, do not depend upon intention. Then I come to what, in my mind, is the strongest indication of intention in the whole document, which lies in the terms which I shall repeat:

> But in case there shall not be any children or child of the said intended marriage who being a son shall live to attain the age of 21 years or being a daughter who shall attain that age or marry then the said William King shall hold the said hereditaments to the use of the right heirs of the said Samuel Culff.

That seems to me to be the plainest possible indication that nothing was intended to go over to the right heirs of Samuel Culff if there was a child of the marriage who, being a son, attained 21 years, or, being a daughter, attained that age or married. I cannot conceive that, if it had been the intention of the parties to give a life interest only, the gift over would have been worded in that way.

I now pass to the other indication of intention. The document proceeds as follows: A

> And it is hereby declared that after the decease of the said Eliza Culff the said William King or other the trustees or trustee for the time being of these presents shall be possessed of the said hereditaments upon trust in his or their discretion to repair and insure the buildings thereon [to two-thirds of the full value thereof] and to take surrenders from adjust accounts with and make allowances to tenants and generally to manage the said hereditaments and after the decease of the said Eliza Culff to apply all or a competent part of the income from each child's share of the said hereditaments towards his or her maintenance and education during his or her minority . . . B

Pausing there, I think that the language used—namely, "each child's share of the said hereditaments"—affords yet another indication of the intention that it was to be absolutely, and not for life. The document C then proceeds as follows:

> . . . and to invest and accumulate the surplus (if any) thereof and the income therefrom upon government or real securities in England or Wales (but not in Ireland) for the benefit of the person or persons who would be entitled thereto if the same were money arising from a sale of the said hereditaments with power to apply such accumulations towards the maintenance or education of the person D or persons entitled thereto during his her or their minority or minorities.

Counsel for the plaintiff relied upon that passage also for indication of intention, but I cannot myself attach very much weight to it, although I think that it does assist him to some extent. Apart from the indications contained in the language of the document, it must not be left E out of account that the document was a marriage settlement, and that is regarded in many cases as an indication of intention to make provision for the issue of the marriage, and also an indication of intention to give the property out-and-out to the issue of the marriage, if some issue comes into existence. Dealing with the matter apart from authority, and F having read that settlement, I am left with no doubt in my mind that the intention of the parties to that settlement was to give the fee simple to the children of the marriage, or to the only child, if there was only one child, who fulfilled the description of attaining 21 years, or, being a daughter, marrying. The cumulative effect of the indication of inten- G tion mentioned is extremely strong, but the point which makes me feel completely satisfied of that intention is the form of the gift over.

Having formed that view upon a perusal of the document itself, I think that it is unnecessary that I should deal in any great detail with the judgments in the various cases to which I have been referred, but H it is right that I should mention these cases for the purpose of seeing whether there is anything in them which tends either to displace the view I have formed on the reading of the document or to confirm that view. The earliest case of that is *Uvedale* v. *Halfpenny* (2), which was a case in which the document was rectified. No oral evidence appears to have been given as to the intention of the parties, and it does not appear from the report that there was any recital. There were certainly strong reasons for concluding that there was a mistake, and these reasons were expressed as follows, at p. 151 :

> I would not destroy the settlement, but set it right, according to the intention A and agreement of the parties ; and by the declaration of the trust of the term, the intention and agreement of the parties manifestly appears to be, that the land should be charged with the payment of portions for the younger sons and daughters at certain ages, (viz.) for the sons at 21, and for the daughters at 21 or marriage, and maintenance to begin from the death of the husband ; and this appearing, I do not regard the placing of the term, but will help the mistake, which would otherwise prevent the agreement of the parties from taking effect . . .

B The result was that the court altered the order of the limitation contained in that settlement in order to place the limitation of terms before the limitation to the first son and other sons in tail male, that last-mentioned limitation preceding the portions term in the order in which it stood.

C I will deal with the other cases in the order in which they were cited to me. *Fitzgerald* v. *Fitzgerald* (3) was also a case in which rectification was granted on the evidence afforded by the document itself, but it is true to say, as was pointed out by counsel for the defendants, that the point which appears most to have influenced the Court of Appeal in D Ireland was the fact that there the words " in tail " appeared. There was every indication of intention in the document itself, including the gift over in default of issue of the marriage, but there is no doubt that the Court of Appeal in Ireland attached the greatest importance to the words " in tail " as an indication that the parties were intending to E make the estate an estate in tail, and not an estate for life.

Then *Re Davis's Estate* (4) was a case in which the ultimate gift in favour of the issue female of the marriage was in terms which were sufficient to give them only a life interest, and the court rectified the settlement so as to give them an estate in fee simple. It is true, as again F has been pointed out by counsel for the defendants, that there were certain recitals in that case which assisted the court in coming to the conclusion that a mistake had been made, but there were other indications upon which the court relied.

Re Bird's Trusts (5), the decision of MALINS, V.-C., is not, I think, G of much assistance on the present question, because, as I have said, there was affidavit evidence showing the intention of the parties. One affidavit was made by a party to the deed, and it is not quite clear how far MALINS, V.-C., was relying only upon the document itself and how far he was assisted by that evidence.

H I now come to a line of cases cited by counsel for the plaintiff primarily for the purpose of showing the history of the views of the court upon the question of construction in such a case as appears in the present settlement, but they are of importance because they contain some striking expressions of the view of the court as to how far the document itself reveals the intention of the parties and reveals the mistake made in the preparation of the document. The first of them is *Re Whiston's Settlement, Lovatt* v. *Williamson* (9), the headnote in which states the effect of the decision briefly but accurately as follows :

> An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.

In that case, the ultimate gift in a post-nuptial settlement in favour of the child or children of the settlor was : A

> . . . in trust for such child or children of the settlor as " being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain the age of 21 years or be married under that age which shall first happen the same to be if only one such child paid assigned or transferred unto him or her solely or if two or more such entitled children then to be paid assigned or transferred in equal shares B as tenants in common and the share of each such son is to be paid assigned or transferred at his age of 21 years and of each daughter at her age of 21 years or day of marriage which shall first happen or so soon thereafter as the decease of the survivor of them 'the said settlor and his wife' will permit." The settlement contained an advancement clause, empowering the trustees to raise any part not exceeding one moiety " of the share or portion or respective shares or portions of which any child or children shall be actually or presumptively entitled of and in the trust estate " and " so that the moneys to be raised and applied for any such child or C children respectively be considered as part of his or their share or portion, shares or portions, under these presents."

In that case, CHITTY, J., commenced his judgment as follows, at p. 663 :

> The question I have to decide is, what interest these children took under the settlement of Aug., 1845. It is admitted that the real estate settled by George D Whiston was only an equity of redemption, and that the legal estate therefore was, and still is, outstanding. The settlement contains a series of formal limitations in favour of the settlor's wife, the settlor, and their children ; but when you come to read the actual words of limitation to the children, the words " heirs " or " fee simple " are not used. If the case had to be decided according to the doctrine of legal limitations, it is plain that these children would only take life interests ; but the limitations are, as a fact, only of an equitable interest, and on this point some E of the older text-writers, such as Cruise and Hayes seem to have been of opinion that equity regarded the intention of the settlor in these cases, and did not follow the law . . .

He then proceeded to discuss certain earlier cases and the opinions of the older textbook writers, and he held that the children took a life interest only under the settlement. F

That case was considered by JOYCE, J., in *Re Tringham's Trusts, Tringham* v. *Greenhill* (10), and the judge held in effect, according to the headnote :

> A limitation, in a deed, of a trust of real estate for A. without any words of inheritance, may confer the equitable fee upon him where the intention to do so G is expressed or sufficiently shown upon the face of the instrument.

Having considered the settlement before him, JOYCE, J., held that, there being upon the face of the instrument sufficient indication of intention on the part of the settlor, that an absolute interest should be given to the three children of the marriage, notwithstanding the absence of any H limitation to their " heirs," and in his judgment he said, at p. 490 :

> Having regard to the terms of the surrender and trust deed, I think that the intention to make a complete settlement of the property purchased is tolerably plain, and if there could otherwise have been any doubt upon the subject this would in my opinion be entirely removed by the form of the gift over " in default

of issue," which shows that the children, if any, under the previous gift were to take absolute interests or estates in fee.

The words of limitation to the children were as follows:

> . . . on the decease of the survivor of them the said Mary Ann Tringham [the wife] and any husband she may marry as aforesaid then in trust for all the children of such marriage equally to be divided between them as tenants in common, and in default of issue of such marriage then to such uses as she the said Mary Ann Tringham shall declare in and by her last will and testament in writing, with remainder to the right heirs of her the said Mary Ann Tringham.

It is helpful to note that Joyce, J., in considering the gift over, which in substance was to the same effect as the gift over which I have to consider, took the view that, if there had been any doubt as to whether or not it was intended to make a complete settlement of the property, it would be entirely removed by the terms of the gift over, which showed that the children should have absolute interests. He then considered the decision of Chitty, J., in *Re Whiston's Settlement, Lovatt* v. *Williamson* (9), and distinguished that case, treating it as a case in which Chitty, J. [p. 494]:

> . . . examined the instrument with the result that he found no expression or sufficient indication of intention on the part of the author of the instrument that absolute interests should be given . . .

It is of interest to note that Joyce, J., used these words, at p. 495:

> I may add that if I could not have seen my way thus to determine as a matter of construction of the deed, then, having regard to *Re Bird's Trusts* (5) and *Fitzgerald* v. *Fitzgerald* (3), I should have had most seriously to consider whether I ought not to rectify the declaration of trust in this case by the insertion of the word "heirs" where it is supposed to be required.

The decision of Joyce, J., in *Re Tringham's Trusts, Tringham* v. *Greenhill* (10) was afterwards disapproved by the Court of Appeal in *Re Bostock's Settlement, Norrish* v. *Bostock* (1), but I find his observation of intention manifested by the document of assistance in the present case.

Next I shall refer to *Re Oliver's Settlement, Evered* v. *Leigh* (11), which is a decision of Farwell, J. In that case, in the marriage settlement there was again an ultimate gift in favour of the children of the marriage, without words of limitation sufficient to make it a gift in fee simple. The settlement contained a provision with a hotchpot clause, an advancement clause and a gift over in the following terms:

> . . . if there should be no child of the intended marriage who should attain a vested interest under the trusts aforesaid, the trustee should stand possessed of the lands settled by John Oliver in trust for such persons as he should appoint, and in default of appointment for his right heirs.

In a brief judgment, Farwell, J., said, as to the construction of the gift over in favour of the children [p. 194]:

> The law upon this point has been very recently stated by Joyce, J., in *Re Tringham's Trusts, Tringham* v. *Greenhill* (10), and I need not therefore state it again.

Then Farwell, J., read the first paragraph of the headnote in *Tringham's* case (10), and continued as follows:

> I adopt that as a correct statement of the law, and all I have to consider is whether in the case before me there is sufficient to shew an intention that the children should take the fee. I think there is. The trustees are directed to convey

> the trust estate to the children, and that naturally means all the estate they had. The power of advancement seems almost conclusive, for it is hardly conceivable that the parties intended an advance to be made of half the value of a life estate in remainder. But I think that the gift over, if there should be no child who should attain a vested interest, is absolutely conclusive.

That again, I think, is of assistance in the present case.

I come lastly to *Re Bostock's Settlement, Norrish* v. *Bostock* (1). The headnote in that case, which I think accurately and sufficiently states the facts for the purpose of my decision, is as follows:

> By a settlement made upon his second marriage the husband conveyed freeholds (subject to existing mortgages thereon) to trustees in fee simple to the use of the wife and himself for successive life interests and after his decease "in trust for the child or children" of the husband "now born or hereafter to be born who shall attain the age of 21 years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs" of the husband. The husband then assigned leaseholds, chattels and a policy of insurance upon similar trusts which so far as the children were concerned were expressed in identical terms. The settlement also contained a provision enabling the trustees to "mortgage or charge the said premises hereinbefore expressed to be hereby conveyed and assigned with any sum or sums not exceeding together one-half of the expectant share of any child" and to "apply the same for his or her benefit or advancement." There was also a hotchpot clause to the effect that no child of his first marriage was "to take any part of the trust premises herein comprised without bringing into hotchpot all sums of money and other benefits which he or she may receive" under an earlier settlement:—
>
> *Held*, that the limitations in trust having been perfected and declared by the settlor, they must have the same construction as in the case of legal estates executed, and therefore that in the absence of words of limitation, the children took life estates only in the freeholds.
>
> *Held*, also, that, if it had been necessary to decide the point, there were sufficient indications in the settlement of an intention that the children should take absolute interests in the freeholds. Principle applied by Chitty, J., in *Re Whiston's Settlement, Lovatt* v. *Williamson* (9) followed. *Re Tringham's Trusts, Tringham* v. *Greenhill* (10) overruled. Decision of Eve, J. ([1921] 1 Ch. 432) affirmed, but on different grounds.

The distinction was [p. 471]:

> Eve, J., held that there was no sufficient indication in the settlement of an intention that the children should take absolute interest in the freeholds and accordingly that in the absence of words of limitation they took life interests only.

The effect of the decision in *Re Bostock's Settlement, Norrish* v. *Bostock* (1) was that it set at rest any difference of opinion there was between the judges who decided *Re Tringham's Trusts, Tringham* v. *Greenhill* (10) and *Re Oliver's Settlement, Evered* v. *Leigh* (11), on the one hand, and Chitty, J., who decided *Re Whiston's Settlement, Lovatt* v. *Williamson* (9), on the other hand, and, in the interval of *Re Bostock's Settlement, Norrish* v. *Bostock* (1) if this had been a question as to the effect of the words actually contained in the document, it would have been impossible to hold, as a matter of construction, that anything more than a life interest was given to the plaintiff in the present case. I do not think that there was any distinction on that point of view between *Re Bostock's Settlement, Norrish* v. *Bostock* (1) and the present case, but in the course of their judgments each of the three members of the Court of Appeal indicated that in his view there was a sufficient expression of intention to make it plain that the parties intended the children of the marriage to take absolutely. Lord Sterndale, M.R. says at p. 481:

> I therefore arrive at the same conclusion as Eve, J., but on different grounds.

> The learned judge did not decide this point, but gave judgment for the respondents on the ground that no sufficient expression of intention to give the children more than a life estate could be found in the settlement. If it were necessary to decide this point, I should not agree with the learned judge, and I should think there was such a sufficient expression of intention.

Then again WARRINGTON, L.J., said, at p. 483:

> The point on which the learned judge proceeded depends on the construction of the particular instrument, and I am bound to say that if I felt myself at liberty to act on my view of the construction of the deed without reference to the technical rules governing its effect, I should come to the opposite conclusion to that of the learned judge . . .

In the same case YOUNGER, L.J., expressed himself very strongly to the like effect, at pp. 487, 488. I need not read the whole of that passage, but YOUNGER, L.J., said, at p. 487:

> A close study of the deed satisfies me that it embodies from first to last no other intention than that the children of the settlor on attaining 21 are to take an absolute interest no less in the freeholds than in the other property settled, and I cannot bring myself to doubt that the omission from the limitation of the freeholds to the children of the words adapted indubitably to produce that result is an omission of the draftsman attributable either to accident or to ignorance.

Then he says, at p. 488:

> I find it [the intention to give absolute interest] apparent in the provisions as to hotchpot, and, like FARWELL, J., in *Re Oliver's Settlement, Evered* v. *Leigh* (11), I find the provision as to advancement almost conclusive and the gift over absolutely conclusive on the subject.

The result is that a thorough consideration of all the authorities to which I have referred fortifies me in coming to the conclusion to which I have come on a perusal of the document itself, that the intention of the parties is shown, and, to use the words of YOUNGER, L.J., the deed embodies from first to last an intention that the children of the marriage, on the attainment of the age of 21 years or, being females, marriage, are to take an absolute interest, and, like YOUNGER, L.J., in *Re Bostock's Settlement, Norrish* v. *Bostock* (1), I cannot bring myself to doubt that the omission from the limitation of the freeholds of the words which would produce that result is an omission of the draftsman attributable either to accident or to ignorance. I should say, however, that YOUNGER, L.J., went on to say, at p. 488:

> But there is one thing I do not find in the settlement. I find no recital which would justify the court in saying that its operative provisions are incomplete or imperfect. I find no basis for referring or rectifying it. Nor is there anything executory in the frame of the document. No further or additional instrument is required to give it complete effect. In these circumstances all that the court can do is to construe it according to the import of the words used.

I cannot read that observation of the lord justice as meaning that, if an action for rectification were brought, and if the court were satisfied, on the evidence afforded by the document, that a mistake had been made, and that it did not embody the true intention of the parties, the court would be precluded from rectifying the document. I do not think that the observation can possibly have that meaning, and, as I have said, there is authority for rectifying a document in those circumstances.

Indeed, it was conceded by counsel for the defendants that the jurisdiction exists.

Counsel for the adult defendants informed me that since *Uvedale* v. *Halfpenny* (2), there has been no reported case in England in which there has been rectification where the only evidence relied upon was the document itself, and where the document did not contain any recital which made it manifest that a mistake had been made. That is a very interesting and remarkable fact, but it may be there has been such a case which has not been reported. I do not know. However, in the present case, being satisfied that I have jurisdiction to make this order, and being satisfied also that by making it I shall give effect to the intention of the parties, I propose to make the order for rectification as asked.

Order to rectify settlement. Plaintiff to pay costs by consent.

Solicitors: *Gush, Phillips, Walters & Williams* (for all parties).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

ROSS T. SMYTH & CO., LTD. *v.* T. D. BAILEY, SON & CO.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **March 13, 14, 18, 19, May 30, 1940.**]

Sale of Goods—Rejection—Sale of 15,000 *units of corn—" Separate documents for each* 1,000 *units and each* 1,000 *units to be considered a separate contract"—Notice of appropriation for about* 15,444 *units—First provisional invoice for* 15,444 *units—Amended provisional invoice for* 15,000 *units—Validity of first tender—Whether withdrawn by amended provisional invoice—Validity of second tender—Sale of Goods Act*, 1893 (c. 71), *ss.* 17, 18, 19, 30, 31, 32.

A contract, dated Aug. 3, 1938, provided for the purchase of 15,000 units, 2 per cent. more or less, of No. 2 yellow American corn, with an option to the seller of shipping a further 3 per cent. more or less on contract quantity. At the foot of the contract were the words: "Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract." In pursuance of this contract, the sellers wrote to the buyers on Aug. 27 giving notice of appropriation of about 15,444 quarters of corn as per "Generton" bill of lading, and on Sept. 6 sent a provisional invoice for 15,444 $\frac{214}{480}$ quarters, amounting to £17,471 10*s.* 6*d.*, and the provisional invoice stated that there were 15 bills of lading dated Aug. 26, each for an amount of bushels equivalent to 1,000 units, and one for an amount equivalent to 444 $\frac{214}{480}$ units. On Sept. 7 the buyers rejected the provisional invoice as not being in accordance with the contract, and on the same day the sellers sent an amended provisional invoice for 15,000 quarters amounting to £16,968 15*s.*, stating that there were 15 bills of lading dated Aug. 26, each for a number of bushels equivalent to 1,000 units. This provisional invoice was received by the buyers on Sept. 8, and it was then arranged that the matter should proceed to arbitration:—

HELD: (i) the buyers committed a breach by wrongfully refusing to accept the first documents which were in accordance with the contract and covered the total quantity which the sellers were bound to deliver.

(ii) the breach was not waived by the mere act of sending the amended invoice, which was no more than an attempt by the sellers to meet the buyers' objection.

(iii) the tendering of the amended invoice did not constitute a repudiation of the contract, as there was no categorical refusal on the part of the sellers, by words or conduct, to perform the contract.

Order of Court of Appeal ([1939] 3 All E.R. 175) *reversed.*

A [**EDITORIAL NOTE.** The House of Lords have upon the main question in this case adopted the view of the Court of Appeal and not that of Branson, J. This is the question whether there was one indivisible contract for 15,000 units or 15 separate contracts for 1,000 units. As to this the House of Lords and the Court of Appeal are agreed that the contract is one and indivisible, and that, therefore, the rejection of the first invoice was a breach. The House of Lords have, however, differed from the Court of Appeal in that they are clear that that breach was never B waived, and that there was no repudiation of the contract. The result is that the decision of Branson, J., is restored for a different reason.

As to Quantity of Goods to be Tendered, see HALSBURY, Hailsham Edn., Vol. 29, pp. 126-130, paras. 153-156; and for Cases, see DIGEST, Vol. 39, p. 496, Nos. 1131-1138.]

C Cases referred to:

(1) *The Parchim*, [1918] A.C. 157; 39 Digest 517, *1344*; 87 L.J.P. 18; 117 L.T. 738.

(2) *The Kronprinsessan Margareta, The Parana*, [1921] 1 A.C. 486; 37 Digest 636, *866*; 90 L.J.P. 145; 124 L.T. 609; *affg.* S.C. *sub nom. The Kronprinsessan Margareta, The Thai*, [1917] P. 114.

D (3) *Wait* v. *Baker* (1848), 2 Exch. 1; 39 Digest 488, *1075*; 17 L.J.Ex. 307.

(4) *Shepherd* v. *Harrison* (1871), L.R. 5 H.L. 116; 39 Digest 520, *1355*; 40 L.J.Q.B. 148; 24 L.T. 857.

(5) *Ogg* v. *Shuter* (1875) 1 C.P.D. 47; 39 Digest 514, *1312*; 45 L.J.Q.B. 44; 33 L.T. 492.

(6) *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164; 39 Digest 520, E *1357*; 47 L.J.Q.B. 418; 38 L.T. 597.

(7) *Clemens (E.) Horst Co.* v. *Biddell Brothers*, [1912] A.C. 18; 39 Digest 575, *1801*; 81 L.J.K.B. 42; 105 L.T. 563; *revsg.*, [1911] 1 K.B. 934.

(8) *Groom (C.), Ltd.* v. *Barber*, [1915] 1 K.B. 316; 39 Digest 576, *1802*; 84 L.J.K.B. 318; 112 L.T. 301.

(9) *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; F 39 Digest 569, *1747*; 53 L.J.Q.B. 497; 51 L.T. 637; *affg.*, 9 Q.B.D. 648.

(10) *Maple Flock Co., Ltd.* v. *Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 148; Digest Supp.; 103 L.J.K.B. 513; 150 L.T. 69.

(11) *Robert A. Munro & Co., Ltd.* v. *Meyer*, [1930] 2 K.B. 312; Digest Supp.; 99 L.J.K.B. 703; 143 L.T. 565.

G Appeal by the sellers from an order of the Court of Appeal (Scott, Clauson and Goddard, L.JJ.), dated May 18, 1939, and reported [1939] 3 All E.R. 175, reversing an order of Branson, J., dated Dec. 14, 1938, and reported [1939] 1 All E.R. 115. The facts are fully set out in the opinion of Lord Wright.

H *A. T. Miller, K.C.*, and *Cyril T. Miller* for the appellants.

H. U. Willink, K.C., and *R. A. B. Powell* for the respondents.

Lord Wright: My Lords, my noble and learned friends Viscount Maugham and Lord Atkin ask me to say that they agree with the opinion which I am about to deliver.

My Lords, this is the fifth tribunal to which the present dispute has been submitted. It was in the first instance referred to two arbitrators and an umpire, who decided in favour of the appellants. On appeal, the committee of appeal of the London Corn Trade Association awarded in favour of the respondents, but stated a case for the opinion of the court. The case came before Branson, J., as commercial judge, who held that A the appellants were entitled to succeed. His judgment was reversed by the Court of Appeal, and the award of the appeal committee in favour of the respondents was upheld. As I understand it, your Lordships are now, after hearing a full argument, of opinion that the original award of the umpire was correct, and that the alternative award of the appeal B committee should receive effect. The case, however, involves complications of fact, and difficult questions of law and construction.

The dispute arises under a contract, dated Aug. 3, 1938, between the appellants as sellers and the respondents as buyers for the sale of 15,000 units of 480 lbs. each of No. 2 yellow American corn at 25*s.* 4½*d.* per C unit, including freight and insurance to Hull, shipment to be from Canadian or Atlantic ports, including Albany. Bills of lading were to be dated not earlier than Aug. 16, 1938, and not later than Aug. 31, 1938. The contract quantity of 15,000 units was also described as the mean quantity. Not only was it subject to 2 per cent. more or less, but the D sellers had the option of shipping a further 3 per cent. more or less, the excess or deficiency over the 2 per cent. to be settled at the c.f. and i. price on date of bill of lading and on the quantity thereof. Thus the contract permitted a shipment within the range of 14,250 and 15,750 units at the sellers' option. Payment was to be by cash or at sellers' E option by draft in London in exchange for shipping documents, on or before arrival of the vessel, and was to be on bill of lading weights, but the shipment was to be weighed at time of discharge and any deficiency or excess on bill of lading weights was to be adjusted between the buyers and sellers. The contract, which was on a printed form issued by the F London Corn Trade Association, headed Canadian and United States of America Wheat Contract, contained elaborate provisions. It will here be enough to refer to conditions 1 and 3. The former deals with notice of appropriation, which, with the ship's name, is within 7 days from date of bill of lading to be telegraphed, cabled or radioed by the G shipper to his buyer, and by each subsequent seller also by telegram. Nothing more is here material in the clause, except the term

> A valid notice of appropriation when once given shall not be withdrawn.

Condition 3 provided, *inter alia*, that each shipment appropriated in H whole or in part fulfilment of this contract was to be deemed a separate contract, but each bill of lading was not to be considered a separate shipment except as to the date on which it could be appropriated. In the event of more than one shipment being made, each shipment was to be considered a separate contract, but the margin on the mean quantity sold was not to be affected thereby. There were elaborate clauses providing for arbitration and for appeal to the appeal committee. On the face of the printed contract, there was a stamped clause in the following terms:

> Separate documents for each 1,000 units and each 1,000 units to be considered
> A a separate contract.

On Aug. 27, 1938, notice of appropriation was given under the contract by the appellants to the respondents of about 15,444 qrs. corn shipped per s.s. Generton. On Sept. 6, 1938, the appellants posted to the respondents at their office at Hull a provisional invoice of a parcel of No. 2 yellow corn
B shipped per s.s. Generton from Albany to Hull, sold to the respondents as per contract dated Aug. 3, 1938. The invoice was for 15,444 $\frac{214}{480}$ qrs. at 25*s.* 4½*d.* per qr., c. and f., amounting to £19,595 2*s.* 9*d.*, less freight at 2*s.* 9*d.* per qr., £2,123 12*s.* 3*d.*, prompt Sept. 16, 1938, 15 bills of lading dated Mar. 26, 1938, each for 8,571 $\frac{24}{56}$ bushels, which is equivalent to
C 1,000 units, and one bill of lading for 3,809 $\frac{32}{56}$ bushels, which is equivalent to 444 $\frac{214}{480}$ units.

This provisional invoice was received by the respondents on the morning of Sept. 7. They telephoned to the appellants rejecting the tender (as it was inaccurately called) on the ground that the documents
D were not in accordance with the contract, and wrote on the same day confirming the rejection, adding that the contract must be considered repudiated in its entirety, and naming an arbitrator in case the matter should proceed to arbitration. On the same day, the appellants sent an "amended provisional invoice for 15,000 qrs.," stating that there were
E 15 bills of lading dated Aug. 26, 1938, each for 1,000 units. This was received by the respondents on the morning of Sept. 8. It seems that the ground on which the respondents had rejected the first invoice was that there was the separate bill of lading for 444-odd units. The amended invoice, it appears, was an attempt to meet that objection, but
F the respondents, after receiving it, telegraphed to the appellants:

> Cannot make any exception on letter Sept. 7 respecting contract Aug. 3.

They required the arbitrator to proceed on the next day. In reply, the appellants telegraphed appointing their arbitrator. This was confirmed
G by a letter of the same day from the respondents. An umpire was, by arrangement on the telephone, appointed, and on Sept. 9 he made an award (the arbitrators having differed) that the respondents "were not entitled to reject the goods." The award does not further identify "the goods." It is an informal document, the particulars being typed on a
H common printed form. The dispute is expressed to have arisen between the respondents and appellants in respect to 15,000 qrs. No. 2 yellow corn shipped per s.s. Generton under contract dated Aug. 3, 1938. I have no doubt that "the goods" meant the whole parcel of 15,444-odd units, which were rejected, and in respect of which arbitration was demanded and accepted. There is no hint anywhere that the amended

invoice was the subject of the arbitration, which appears to have been ignored at that stage.

The respondents gave notice of appeal to the appeal committee. The appeal was heard on Sept. 14, 1938. Meantime, the vessel having presumably arrived, and it being necessary to land the goods, the parties came to an arrangement, confirmed by a letter from the respondents dated Sept. 14, 1938, that the respondents should lift the documents against this contract for 15,444 qrs. maize at contract price, without prejudice in any way to their rights under the contract at the appeal. I regard the terms of this letter as confirming the view which I had formed that the goods which were the subject of the arbitration were the whole parcel of 15,444-odd units. It was further agreed that, if the appeal should succeed, the respondents were to be credited with the difference between the contract price which the respondents had paid to lift the documents and an agreed price of 24*s.* c.i.f., the market having fallen. On the other hand, if the respondents lost the appeal, the appellants would keep the contract price which had been paid.

The appeal committee made their award on Nov. 4, 1938, in the form of a special case subject to the opinion of the court to raise the question of law:

> Whether on the true construction of the contract and on the facts found the buyers were entitled to reject the goods tendered.

The special case set out the facts which I have stated above, including copies of the documents and correspondence and bills of lading. The bills of lading were to shipper's order, and were indorsed in blank, but it is clear, had been received and held by the appellants until they were lifted under the "without prejudice" arrangement. The award was that, subject to the opinion of the court, the appeal should be allowed and that the appellants should pay to the respondents the difference between the contract price and 24*s.* per unit. There was an alternative award that, if the court should be of opinion that there was no waiver of the buyer's breach of contract, or that the award was otherwise erroneous in law, the original award should be confirmed. The quantities are not specified, but it is clear that the difference was to be paid on the quantity of 15,444-odd units, in accordance with the arrangement, and the alternative award, under which the appellants kept the price paid, must manifestly have related to the same quantity. The original award, which was confirmed, must, it follows, have been for the same amount. The special case states an alternative argument, put forward on behalf of the appellants, that the appellants were entitled to succeed on the amended provisional invoice for 15,000 units, but their principal contention was that "the first tender was valid and had never been withdrawn." I think that the alternative award was based on this contention. There is not in terms a second alternative on the basis of a tender of 15,000 units in 15 bills of lading. On the award as it stands, it would appear that that issue is not before the court, and could only be dealt with by sending the award back to the arbitrators to make an award on that basis.

The specific findings of the appeal committee are important. They found that the notice of appropriation was good, and made the contract one for 15,444 units. The essential findings are as follows:

> (3) The provisional invoice of Sept. 6 tendering 15 bills of lading each for 1,000 units and one for 444 quarters 214 lbs. was a valid tender in accordance with the custom and practice of the trade and the terms of the contract. (4) The sending of the provisional invoice dated Sept. 7 amounted to a withdrawal of the provisional invoice of Sept. 6 and a waiver of buyers' breach of contract. (5) The tender by the provisional invoice of Sept. 7 was invalid because it was not a tender of the contract quantity as declared by the notice of appropriation and the provision in the contract that each 1,000 units were to be considered a separate contract did not affect the obligation of the sellers to tender such contract quantity.

The special case came before BRANSON, J., who decided in effect that the amended provisional invoice of Sept. 7 was valid, because of the stamped clause that each 1,000 units was to be considered a separate contract. He treated the finding of the appeal committee that the first provisional invoice was withdrawn as a finding of fact, but also agreed with it. The Court of Appeal reversed the decision of BRANSON, J., and upheld the award. They held that the result of the appropriation was that the property in the whole 15,444 qrs. passed to the buyers under the Sale of Goods Act, 1893, and that nothing the sellers could thereafter do or say could undo the fact of that appropriation. The natural effect, if this were correct, might seem to be that the respondents should pay for the goods at the contract price, but the court went on to hold that the sending of the amended invoice entitled the respondent to treat it as a repudiation of the contract and to rescind the contract thereon. Presumably, on this view, the property must have revested in the appellants, and the goods must have been taken and paid for outside the contract altogether.

It is clear that there has been a great diversity of opinion in the case. I shall say at once that I think that the appeal committee were wrong in law in holding that there was a "waiver" by the appellants of the buyers' breach of contract, and that the award in the alternative should be upheld and the original award of the umpire confirmed. I shall begin with the notice of appropriation, which is the document earliest in date after the contract and the bills of lading. I have already quoted the opinion of the Court of Appeal that the result of the appropriation was that the property in the 15,444 quarters passed to the buyers under the Sale of Goods Act, 1893. I think, with respect, that the Court of Appeal, presumably because they had not the bills of lading before them, have by inadvertence fallen into an error, which, if not explicitly and fully controverted by this House, might be taken to lay down a general principle, and so have serious consequences in unsettling the course of business generally in c.i.f. contracts. [The notice of appropriation under an ordinary c.i.f. contract is not intended to pass, and does not pass, the property. Where, as here, the sale is of unascertained goods by description, there are, at that stage, no goods to which the contract can attach.

The seller is free to appropriate to the contract any goods which answer the contract description. This he does by the notice of appropriation which specifies and defines the goods to which the contract attaches. These thereupon he is bound to deliver and the buyer is bound to accept, subject to the terms of the contract. That, however, does not involve the passing of the property. The property cannot pass under a contract of sale until A
the goods are ascertained (the Sale of Goods Act, 1893, s. 16), but, once they are ascertained, the property passes at the time when the parties intend it shall (sect. 17 (1)). As the parties seldom express any such intention, or perhaps even think of it, the intention will generally be a matter of inference from the terms of the contract, the conduct of the B
parties, and the circumstances of the case (sect. 17 (2)). Then sect. 18 gives some general rules which are to apply "unless a different intention appears." Of these rules, the Court of Appeal rely on r. 5 (1), which provides as follows:

> Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. . . . C

The assent is generally inferred from the terms of the contract or the practices of the trade. Subrule (2) deals with the delivery of the goods D
to the carrier for transmission to the buyer without reserving the right of disposal, and provides that in such a case there is deemed to be an unconditional appropriation. This latter subrule, which only deals with delivery to the carrier and not with actual notice of appropriation, is disregarded by the Court of Appeal. In such event, the carrier receives and E
holds the goods for the buyer, so that in law they are delivered to the buyer. Compare also sect. 32 (1). However, the court, I venture to think, should not have disregarded the word "unconditionally" in subrule (1). I do not construe subrule (1) as limited to a case where there is an express term that the notice of appropriation is unconditional, or, on the other F
hand, to a case where the notice of appropriation is in terms conditional, though the words contained in the notice of appropriation—namely, "under the usual reserves as per contract"—would, I think, necessarily import that the contract conditions were to be borne in mind. In this case, the facts known to both parties would import that the appropriation G
was conditional. The bills of lading were held by the appellants. The contract provided for cash or (at sellers' option) an acceptance of sellers' draft against documents. That condition for the transfer of the documents had not been fulfilled. The bills of lading were the symbols of the goods, and the appellants, by retaining them, retained as against the H
respondents title and control over the goods. All the respondents had at that stage was a contractual right to obtain control, and thereby become owners upon taking up the documents. It is impossible, in my opinion, to hold that the notice of appropriation was, even apart from the express reservation, unconditional. It is unfortunate that the

attention of the Court of Appeal does not appear to have been drawn to this aspect of the case, or to the form of the bills of lading, which were to shipper's order, and were indorsed in blank and transferred to, and retained by, the appellants. In such circumstances the appellants thus held the *jus disponendi*, whether the goods were shipped by the
A shippers as their agents or were transferred to them after shipment, at least from the time when they received the bills of lading.

However, there is a more serious objection to the view taken by the Court of Appeal. This objection rests on the Sale of Goods Act, 1893, s. 19 (1), which expressly deals both with the case of the sale of specific
B goods and with the case of the appropriation of goods to the contract subsequent to the contract. It provides that the seller may, by the terms of the contract or appropriation, reserve the right of disposal until certain conditions are fulfilled, and that, in such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or bailee for trans-
C mission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. By sect. 19 (2), it is provided that, if by the bill of lading the goods are deliverable to the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal. It is true that all these rules, both under
D sect. 18 and under sect. 19, are *prima facie* rules, and depend on intention, but the intention in this regard by the parties is seldom or never capable of proof. It is to be ascertained, as already stated here, by having regard to the terms of the contract, the conduct of the parties and the circumstances of the case. The contract in question, though containing several
E complicated provisions, was in its essence a c.i.f. contract. In particular, the provision already referred to for cash against shipping documents clearly contemplated that the sellers (the appellants) were to retain the documents, including the bills of lading, until the condition of payment was fulfilled. It is true that, by the bills of lading, the goods were
F not in terms made deliverable to the seller or his agent, but, for all purposes of the contract, the position was the same as soon as the bills of lading (which were to the shipper's order) were indorsed in blank and transferred to the appellants. When that happened, the appellants had title in, and control over, the goods. They could deal with the goods as
G they liked, even though to deal with them contrary to the notice of appropriation would *prima facie* be a breach of the contract. No property passed to the respondent until the conditions stipulated in the bills of lading for the transfer of the property were fulfilled.

The contract in question here is of a type familiar in commerce, and
H is described as a c.i.f. contract. The initials indicate that the price is to include cost, insurance and freight. It is a type of contract which is more widely and more frequently in use than any other contract used for purposes of sea-borne commerce. An enormous number of transactions, in value amounting to untold sums, are carried out every year under c.i.f. contracts. The essential characteristics of this contract have

often been described. The seller has to ship or acquire after that shipment the contract goods, as to which, if unascertained, he is generally required to give a notice of appropriation. On or after shipment, he has to obtain proper bills of lading and proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer. As a general rule, he does so only against payment of the price, less the freight, which the buyer has to pay. In the invoice which accompanies the tender of the documents on the "prompt"—that is, the date fixed for payment—the freight is deducted, for this reason. In this course of business, the general property in the goods remains in the seller until he transfers the bills of lading. These rules, which are simple enough to state in general terms, are of the utmost importance in commercial transactions. I have dwelt upon them perhaps unnecessarily, because the judgment of the Court of Appeal might seem to throw doubt on one of their most essential aspects. The property which the seller retains while he or his agent, or the banker to whom he has pledged the documents, retains the bills of lading is the general property, and not a special property by way of security. In general, however, the importance of the retention of the property is not only to secure payment from the buyer but for purposes of finance. The general course of international commerce involves the practice of raising money on the documents so as to bridge the period between shipment and the time of obtaining payment against documents. These credit facilities, which are of the first importance, would be completely unsettled if the incidence of the property were made a matter of doubt. By mercantile law, the bills of lading are the symbols of the goods. The general property in the goods must be in the seller if he is to be able to pledge them. The whole system of commercial credits depends on the seller's ability to give a charge on the goods and the policies of insurance. A mere unpaid seller's lien would, for obvious reasons, be inadequate and unsatisfactory. I need not observe that particular contracts may contain special terms, or otherwise indicate a special intention, taking the contract outside these rules. Such a case, to take one example, was *The Parchim* (1), as explained by LORD SUMNER in *The Kronprinsessan Margareta* (2), at p. 516. These special cases, however, may be ignored when I am stating the general practice.

I think it is clear that the sections under discussion did embody law which had been settled at the date of the Act. It would be tedious to refer to all the decisions before 1893, and, indeed, unnecessary, because the Act now conclusively declares the law. I shall briefly refer to a very few which may help to explain the principle. In 1848, in *Wait* v. *Baker* (3), the sale was f.o.b., but, in the respect now material, the principle is the same. The buyer claimed that the property had passed to him when the goods were shipped, though he had not got the bills of lading. PARKE, B., rejected the claim. He said, at pp. 7, 8:

> . . . delivery of the goods on board the ship was not delivery of them to the de-

> fendant [the buyer] but a delivery to the captain of the vessel to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried.

Then he went on to say that, by the bill of lading, the goods were to be carried for the seller, and to be delivered to him if it should not be assigned, and, if it should, to the assignee. The contract contemplated that, by the bill of lading, the seller should retain control, because it stipulated that the price was to be paid on the delivery of the bill of lading. Hence, the act of delivery to the ship did not pass the property. Parke, B., stated that a case of this type was not covered by the ordinary common law rule that delivery of goods to a common carrier to be carried to the buyer amounted to delivery to the buyer, because then the carrier became his agent, and thus, *prima facie*, the property passed and the contract was complied with. In 1871, in *Shepherd* v. *Harrison* (4), a decision on which sect. 19 (3) of the Act is based, this House held that, where a seller sent the bill of lading, accompanied by a bill of exchange, for the price to the purchaser, the latter, if he did not accept the bill of exchange, but retained the bill of lading, obtained no property in the goods. Lord Cairns, after saying that the "invoice described the goods as being shipped on account and at the risk of the plaintiff [the buyer]," added, at p. 13:

> But along with the invoice a bill of lading was taken from the captain making the cotton deliverable, not to the plaintiff, but to the shipper on board. It is perfectly well settled that, in that state of things, the entry on the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading.

The same principle was affirmed by the Court of Appeal in *Ogg* v. *Shuter* (5), a sale f.o.b. I should also refer to *Mirabita* v. *Imperial Ottoman Bank* (6) and the judgment of Cotton, L.J., on which, it is said, sect. 19 is principally founded. Cotton, L.J., said, at p. 172:

> If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers.

I do not fail to observe that, in the various cases, especially before the Act, and perhaps even after it, there is some confusion in the language used in this connection, and no doubt there are some mixed cases, in which the general practice is departed from, and hence the legal position is different. I have thought it important, however, to state the general rules in as simple terms as possible, and to construe the material sections of the Act. Kennedy, L.J., in *Clemens (E.) Horst Co.* v. *Biddell Brothers* (7), in pointing out that, if the goods are lost during the ocean transit, the buyer must still implement his contract when the documents are tendered to him, said, at p. 959:

> The vendor tenders the bill of lading with the insurance policy and other shipping documents (if any) to the purchaser, to whom from the moment of shipment the property has passed . . .

Such expressions must be read subject to all the qualifications which were fully present to the mind of that great commercial judge. He was not in that case concerned with the *jus disponendi*. In the very example which he gives, if the *jus disponendi* had been reserved, the property in the goods in the strict sense could never pass at all. It could pass, if at all, only when the documents were taken up against payment, A
and, before that could happen, the goods had been lost. This illustrates one peculiarity of the c.i.f. contract, which is that the sale can be completed after the loss of the goods by the transfer of the shipping documents. That does not mean that a c.i.f. contract is a sale of documents, and not of goods. It contemplates the transfer of actual goods in the B
normal course, but, if the goods are lost, the insurance policy and bill of lading contract—that is, the rights under them—are taken to be, in a business sense, the equivalent of the goods. ATKIN, J., considered this state of things in *Groom (C.), Ltd.* v. *Barber* (8).

However, as what I respectfully regard as the mistaken view of the C
circumstances adopted by the Court of Appeal does not dispose of the case, I proceed to the most material question in the appeal, which is stated in the special case as follows:

> If the court should be of opinion that there was no waiver of the buyers' breach of contract or that our award is otherwise erroneous in law . . . D

It is clear that the appeal committee regard, and, as I think, rightly regard, the issue of "waiver" as depending on questions of law. Only if it is such can it be specifically submitted to the court. I am entitled to assume that every fact material to the issue is stated in the case. On these facts, can the award of "waiver" be upheld? E

The word "waiver" is a vague term used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase, he claims in *assumpsit* and waives the tort. It is also F
used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by *laches*. The use of so vague a term without further precision is to be deprecated. Here, as I understand the special case, the appeal com- G
mittee were of opinion that the appellants, by the mere act of sending the amended invoice, withdrew the first invoice, debarred themselves from relying on the breach of contract by the respondents in rejecting the goods, rightly held by the committee to be a breach, and further by the same act repudiated their own obligations under the contract, and H
not only released the respondents from their breach of contract but also entitled them to rescind the contract. I cannot find, on the facts stated, any evidence at all to justify these conclusions, unless, which I do not accept, the bare fact of sending the amended invoice is sufficient. In my opinion, the committee have not appreciated what is necessary

before it can be held that a party has repudiated his contract by what is called an anticipatory breach. No doubt the provisional invoice is not a tender, and cannot be taken to be more than an intimation of the way in which the sellers intend to perform their contract, but it is not necessarily even that. It may be no more than an intimation of the way in which the sellers were willing, as a concession to the buyers, to perform the contract. As I understand the facts in this case, the respondents had definitely expressed their refusal to accept the 16 bills of lading specified in the first provisional invoice on the ground that there ought to have been 15 bills of lading, each for 1,000-odd units, the broken quantity of 444 units being equally spread over the 15 bills of lading. The appeal committee have held that this contention of the respondents was wrong, according to both the practice of the trade and the terms of the contract. My own view is that, in so holding, they were right on the interpretation of the contract, because the stamped clause is specific in providing for separate documents for each 1,000 units, and because the language of the clause is not sufficiently specific to justify the construction that the words "each 1,000 units" mean $\frac{1}{15}$ of the actual quantity of 15,444 units declared by the sellers under their option. However, if I am wrong in that, the clause is at least ambiguous, and opens the door to the arbitrators to cure the ambiguity by importing the custom and practice of the trade. I think that the sending of the amended invoice was no more than an attempt by the appellants to meet the respondents' objection by an offer to fulfil the contract by 15 bills of lading each for 1,000 units. In doing so, no doubt, they fell into another difficulty—namely, that the amended invoice was 444 units short of the contract quantity. They were obviously, however, anxious to have the contract carried out, as the market had fallen. There is no evidence that the respondents ever purported at the time to rescind the contract on the ground that it had been repudiated by the act of the appellants in sending the amended invoice. There was no categorical refusal on the part of the appellants, by words or by conduct, to perform the contract, or a categorical declaration that they would perform it only in the terms of the amended invoice. I am satisfied that the arbitrators and umpire were dealing with the first invoice and the full contract quantity. For reasons which I have stated above, the arbitration, initiated apart from, and prior to, the amended invoice, went on with the object of ascertaining the rights under the contract. The case for a repudiation by the appellants is, I think, quite unsubstantial. It must not be forgotten that repudiation of a contract is a serious matter, not to be lightly found or inferred. I cannot do better than quote the words of LORD SELBORNE in *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (9), at p. 438, where he says that you must look at the :

> . . . actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission

if he had the power to rescind, and whether the other may accept it as a reason for not performing his part . . .

The facts of that case are significant. The appellants had failed to pay for an instalment, not because they were either unwilling or unable to pay, but in a mistaken view of the legal position. It was held that there was no repudiation. At p. 445, LORD WATSON scouted the idea A that any departure whatever from the terms of the contract must be sufficient to entitle the other to set it aside.

I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do B so only in a manner substantially inconsistent with his obligations, and not in any other way. However, a mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation. Here there was no actual breach on the appellants' part. There was at most no more than offer or suggestion. This, I think, becomes clear C when the whole course of the transaction, before and after the amended invoice, is taken into account. If that invoice had been seriously intended by the appellants, or seriously regarded by the respondents, there must have been some reference to it at the time, and some claim to rescind there and then. In fact, it was first referred to when it was relied upon in D the arguments before the appeal committee. It has the appearance of an afterthought, and of a lawyer's point.

I should not have ventured to differ from the experienced members of the appeal committee on any mere question of fact, but I am satisfied that their conclusion is based on grounds of law, and is erroneous. In E my opinion, the alternative award in favour of the appellants should be upheld. This makes it unnecessary to consider the ground on which BRANSON, J., decided in favour of the appellants, which, as I understand it, was that, in virtue of the stamped clause, the contract, which was a contract for a total mean quantity of 15,000 units, subject to the F options, which, by the notice of appropriation, became a contract for 15,444 units, suffered a metamorphosis, and became a bundle of 15 contracts each for 1,000 units, and one further contract for 444 units. He held that the amended invoice was good so far as 15 of these contracts went, and was not invalidated because it ignored or omitted what was G the separate contract for 444 units. This shortage could have been dealt with by an award of separate damages, if there had been any damages, but in fact there were not any. The appeal committee had rejected a contention of this nature on the ground that the stamped clause did not affect the obligation of the sellers under the Sale of Goods H Act, 1893, s. 30 (1), to tender the contract quantity of 15,444 units. I do not feel the particular difficulty which BRANSON, J., felt about what he thought was the metamorphosis effected by the stamped clause, though I feel that the introduction of a clause like that into a carefully constructed and elaborate contract will certainly cause trouble unless

there is a revision of the contract in order to incorporate it and fit it in. A clause that each delivery is to be treated as a separate contract is quite common in instalment contracts. Even in this contract, apart from the stamped clause, there is a provision that each shipment (for there may be more than one under the contract) is to be considered a separate contract.
A Such clauses are subsidiary clauses, which generally have effect upon questions of performance. There is still only one contract and one contract quantity, though, for certain purposes, in the way of performance, particular instalments or shipments and parcels may be treated in separation from the others. "A contract for the sale of
B goods by instalments is a single contract not a complex of as many contracts as there are instalments under it": *Maple Flock Co., Ltd.* v. *Universal Furniture Products (Wembley), Ltd.* (1), at p. 154. Sect. 31 (2) of the Act deals with separate deliveries which are defective, and the defects may be either in quality or in quantity. This subsection was
C considered in *Robert A. Munro & Co., Ltd.* v. *Meyer* (11), at p. 329. It was, I apprehend, based on the words of LORD SELBORNE in *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (9), at p. 439. It must always be a question in such cases whether a refusal by word or conduct or failure to deliver more than certain instalments or quantities, and not the whole
D contract quantity, goes to the root of the contract so as to constitute a total repudiation. In the present case, if it appeared that the appellants were only delivering 15,000 units instead of 15,444 units, and were not delivering any more, the facts might be such as to bring the issue within sect. 30 (1) and give the respondents the right to reject the 15,000 units.
E On the other hand, it does not seem to me that the buyers could refuse to accept particular deliveries as they were made, merely on the ground that they were separate instalments of 1,000 units each. These in themselves might be perfectly good instalments. The view taken by the appeal committee depends on the view that there was what they seem to
F have construed as an expressed intention to fulfil the contract by delivering 15,000 units and no more. However, the question can only arise in this case if the first invoice is eliminated and the amended invoice is treated as the material invoice. As, in my opinion, the rejection by the respondents of the goods in the first instance was never adeemed,
G and the first invoice was never withdrawn, the position which would have arisen under the amended invoice need not be finally considered. In my opinion, the appeal should be allowed. The alternative award in favour of the appellants should be upheld. The appellants should have their costs of the appeal and their costs in the courts below.

H LORD ROMER: My Lords, I concur.

LORD PORTER: My Lords, I also concur.

Appeal allowed with costs.

Solicitors: *Middleton, Lewis & Clarke* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

VRONDISSIS *v.* STEVENS.

[KING'S BENCH DIVISION (Atkinson, J.), **April 22, 23, 24, 25, May 1, 1940.**]

Insurance—Marine insurance—Freight—Loss of freight not recoverable if arising from constructive total loss of vessel—Vessel abandoned either because loss appeared unavoidable or because cost of repairs would exceed A
value of vessel when repaired—Institute Time Clauses (Freight), cll. 5, 6.

A policy of marine insurance of freight provided, *inter alia*, that, in the event of total or constructive total loss of the vessel, total loss or constructive total loss of freight arising therefrom would not be recoverable. The vessel struck a reef, was severely damaged, and was finally beached. The voyage was abandoned. The plaintiff claimed under B
the policy for loss of freight, alleging in his particulars of claim that it was impossible to repair the vessel so as to enable her to complete the voyage with the cargo, or alternatively that to repair the vessel sufficiently to enable her to complete the voyage would have cost more than her value when so repaired. The defendant thereupon contended that the vessel was a constructive total loss and that the loss of freight had arisen therefrom within the meaning of the exceptions clause in the C
policy :—

HELD : if the vessel was reasonably abandoned as a constructive total loss on account of its actual loss appearing to be unavoidable, the loss of freight was consequential upon such loss, and arose therefrom within the meaning of the exceptions clause in the policy. If, however, although the repair of the vessel was physically possible, the cost of repairs would D
have exceeded the value of the vessel when repaired, and the vessel was, therefore treated as a constructive total loss, the loss of freight was not consequential upon, and did not arise from, that constructive total loss.

[EDITORIAL NOTE. The question here is when loss of freight "arises from" the loss of the ship, and it is held that loss of freight does not arise from the loss E
of the ship when the latter loss is a constructive one by reason of the cost of repairs exceeding the repaired value of the ship.

AS TO TOTAL LOSS OF FREIGHT, see HALSBURY, Hailsham Edn., Vol. 18, pp. 359-361, paras. 516, 517; and FOR CASES, see DIGEST, Vol. 29, pp. 256-260, Nos. 2078-2101.]

Cases referred to : F

(1) *Roura & Forgas* v. *Townend*, [1919] 1 K.B. 189; 29 Digest 273, *2214*; 88 L.J.K.B. 393; 120 L.T. 116.

(2) *Carras* v. *London & Scottish Assurance Corpn., Ltd.*, [1936] 1 K.B. 291; Digest Supp.; 105 L.J.K.B. 689; 154 L.T. 69.

(3) *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1937] 1 K.B. 1; G
[1936] 2 All E.R. 242, 1488, n.; Digest Supp.; 105 L.J.K.B. 703; 155 L.T. 114.

PRELIMINARY ISSUE OF LAW in an action for damages for loss of freight. The facts are fully set out in the judgment.

Cyril T. Miller for the plaintiff. H

Sir Robert Aske, K.C., and *A. J. Hodgson* for the defendant.

ATKINSON, J. : This is an action brought on a policy of marine insurance, underwritten by the defendant and others, by the owner of the ship Antonios Vrondissis for loss of freight. The freight, valued at £3,000, was covered for 12 months from Oct. 15, 1935, to Oct. 15, 1936. Para. 2 of the points of claim is as follows :

> On or about Aug. 3, 1936, while the said steamship was on a voyage from Kem to Hull with a cargo of wood, the freight thereon became a total or alternatively a constructive total loss by perils of the sea, or other perils, losses or misfortunes within the meaning of the said policy. Particulars. Shortly after sailing from Kem with the said cargo on board the said steamship on Aug. 3, 1936, struck a reef or rock in the vicinity of the Kem Reef, and was so severely damaged thereby that she had to be beached. After extensive salvage operations and the discharge of part of the said cargo, the said steamship on or about Aug. 13 was towed to Archangel where, on or about Aug. 15, she was again beached in the river and there remained filling with water at every tide. The remainder of the said cargo was discharged at Archangel, but no dry-dock was available at Archangel and the said damage was so severe that it was impossible to repair the said vessel so as to enable her to complete the said voyage with the said cargo on board, and the said voyage was abandoned. Alternatively the said damage was such that a prudent uninsured owner would not have proceeded with the said voyage and/or was such that to repair the said damage so as to enable the said steamship to complete the said voyage with the said cargo on board would have cost more than her value when so repaired and/or more than the benefit to be derived therefrom.

The points of claim, therefore, contain an allegation of a loss of freight based on the impossibility of repair so as to complete the voyage with the cargo, and an alternative allegation of a constructive total loss of freight based on the commercial impossibility of repair sufficient to complete the voyage with the cargo. The defence, in para. 2, puts all the allegations in the points of claim in issue, and in para. 3 it raises a point of law on the terms of the policy. Para. 3 is as follows :

> Alternatively, by reason of the facts and matters in the said particulars the Antonios Vrondissis was and became a constructive total loss and notice of abandonment was given to her hull underwriters by the plaintiff on or about Aug. 6, 1936. And any total or constructive total loss of freight (which is not admitted) was and is not recoverable under the express terms of the policy and/or of the contract of insurance on freight. Particulars. (*a*) The said policy expressly provided " In the event of total loss and/or constructive and/or arranged and/or compromised total loss of vessel, total loss and/or constructive total loss of freight arising therefrom is not recoverable," and any total or alternatively any constructive total loss of freight arose from the loss of the vessel as aforesaid . . .

On Apr. 12, 1940, an order was made as follows :

> That the terms of the policy and slip being admitted and the defendant (for the purpose of argument only) admitting the allegations made in para. 2 of the points of claim, there be tried as a preliminary issue the point of law raised in the pleadings of whether or not on a proper construction of the true contract of insurance the plaintiff is entitled to recover from the defendant.

Beyond doubt, the intention had been to get a decision on the point of law raised in para. 3 of the defence, but it soon became clear that the ship did not, as a matter of law, become a constructive total loss merely by reason of the facts and matters alleged in the statement of claim. Therefore, counsel agreed upon an addition to the order, and this comes in after the words " Points of Claim " :

> and the plaintiff having admitted that the Antonios Vrondissis was in fact a constructive total loss and that notice of abandonment was given to the underwriters on hull on Aug. 6, 1936, and stating that no impossibility arising through loss of time as alleged under para. 2 as aforesaid, there be tried as a preliminary issue . . .

However, there has been no agreement as to why or how the ship became a constructive total loss. I am left in doubt as to whether the ship was a constructive total loss because it was reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because the cost of repairing the damage would have exceeded the value of the ship when repaired. It may be that the ship was impossible of repair, either permanently or for the completion of that voyage with her cargo of timber, the most buoyant of cargoes, and in that event the question A of the cost of repair would not arise. On the other hand, it may be that the ship was repairable, but that the cost was prohibitive both for the purposes of the Marine Insurance Act, 1906, s. 60, and as alleged in para. 2 of the statement of claim. I do not think that this procedure is very appropriate where so much is left in doubt and where the court B must express a view on hypothetical sets of facts, a view which does not determine the action but leaves it still to be tried.

The argument has mainly turned upon the effect of two recent cases in the Court of Appeal dealing with commercial loss of freight, and I have a suspicion that both sides know or suspect that it will turn out C that the ship was repairable but at a prohibitive expense. The question of law is as to the meaning and effect of the exception in the freight policy which I have read in part from para. 3 of the defence. The policy, which is a printed form down to a point, covers freight valued at £3,000, and then there is this typewritten clause : D

> Subject to the Institute Time Clauses (Freight) as attached hereto.

It will be remembered that cll. 5 and 6 of those Time Clauses provide as follows :

> 5. In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer E be fully or only partly loaded or in ballast, chartered or unchartered. 6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Then, going back to the typewritten clause in the policy, it provides as follows : F

> In the event of total loss and/or constructive and/or arranged and/or compromised total loss of vessel, total loss and/or constructive total loss of freight arising therefrom is not recoverable hereunder.

Does the alleged loss of freight " arise from " the constructive total loss of the ship ? That is the question in this case. It is contended for the defendant that the plain intention of the parties was to exclude G liability under the policy where there has been a total or a constructive total loss of the ship. The underwriters, if that was their intention, had as a model a very simple clause in the Institute Time Clauses for policies on hulls which was incorporated in the hull policy in this case, because cl. 18 provides as follows : H

> In the event of total or constructive total loss no claim to be made by the underwriters for freight whether notice of abandonment has been given or not.

If they had copied that clause, a clause with which they must have been familiar, no question would have arisen, but they have chosen to incorporate the words " arising therefrom," and it is necessary, therefore, to determine the effect of that addition. In my view, if a ship becomes a total loss, and the owner cannot perform his contract of carriage, his loss of freight is consequential upon the loss of the ship, and arises therefrom. If a ship is properly abandoned as a constructive total loss on account of the actual loss appearing to be unavoidable, A repair being physically impossible, again, in my view, any loss of freight is consequential upon such constructive total loss of the ship, and may fairly be said to arise therefrom. Such a loss of ship is not necessarily followed by loss of freight. The disaster may happen so close to the port of discharge that the cargo may be saved, and in some other way, B but, if there is a loss of freight in such circumstances, I think that it does arise from the constructive total loss of the ship. So, too, if the owner loses possession of the ship, as by capture by an enemy, and it is unlikely that he can recover it, loss of freight is consequential upon and arises from such loss, as in *Roura & Forgas* v. C *Townend* (1). What is the position, however, if a ship becomes a constructive total loss because, although repair is physically possible, the cost would exceed the value when so repaired, and the ship is, therefore, abandoned to her underwriters, and the freight is not in fact earned? Can it be said that the loss of freight is consequential upon, D or arises from, that constructive total loss? In *Carras* v. *London & Scottish Assurance Corpn., Ltd.* (2) and *Kulukundis* v. *Norwich Union Fire Insurance Society* (3), the Court of Appeal has made it quite clear that the question of commercial loss of freight depends upon whether the charterparty under which it was to be earned was destroyed by E perils of the sea. It is in truth a question arising as between the shipowner and freighter, and is an entirely different question from the question of the commercial loss of the ship as between the shipowner and hull-underwriter. In the latter case, commercial loss is established if it is proved that the cost of the complete repair of the ship, making F no allowance for any general average contribution, is greater than the repaired value. Very often the insured value is taken as the repaired value. Clause 14 of the Institute Time Clauses so provides, and is incorporated in the plaintiff's policy on the hull in this case. By agreement, any sum can be fixed in advance as the repaired value. The test G may thus be very artificial. As between shipowner and underwriter of freight, the question depends upon whether the shipowner is excused as between himself and the freighter from the performance of his contract of carriage. His obligation primarily is to perform that contract and carry the cargo to its destination. It is only if he can establish a H commercial loss which will excuse him from the performance of the obligation as between him and the freighter that he can claim on his freight policy. The rule as to when a commercial loss is established as between owner and freighter is not the same rule, nor is it a branch of the same rule, as that which applies as between owner and hull-underwriter, as was said by GREENE, L.J., in the *Kulukundis* case (3), at p. 16 ([1936] 2 All E.R., at p. 257). Loss of freight is established upon proof that the cost of temporary repairs to the vessel sufficient to enable her to carry her cargo to its destination, less the estimated general average contribution to be made by the cargo, would have exceeded the repaired value of the ship.

At least three matters of difference emerge between the tests of A commercial loss for the purpose of establishing constructive total loss of vessel and commercial loss for the purpose of establishing loss of freight. In the one case, it is the cost of permanent repair, allowing nothing for general average contribution, compared with a repaired value which may be artificial. In the other, it is the cost of temporary repairs, B allowing for general average contribution, compared with the actual repaired value. In *Carras* v. *London & Scottish Assurance Corpn., Ltd.* (2), the value of the ship repaired was £13,000. The agreed repaired value was £45,000. The cost of permanent repair exceeded £13,000, but was less than £45,000. There was, therefore, no constructive total C loss of ship, but as the cost of temporary repairs exceeded the value of the ship so repaired, it was held that commercial loss of freight was established. Clearly this loss did not arise from any constructive total loss of the ship, because there was none, but, if the agreed repaired value had been its true value of £13,000, then a constructive total loss D of the ship would have been established. Could that change of figure effect a change of causation of the loss of freight ? In my opinion, it could not. Contrasting the two contracts, Greene, L.J., said, in the *Kulukundis* case (3), at p. 17 ([1936] 2 All E.R., at p. 257) :

> The contract here is a totally different contract, and there seems to be no ground E in logic for assuming that the facts, which will constitute a commercial loss for the purposes of the one contract, are necessarily the same as those which will constitute a commercial loss for the purposes of the other. If there are analogies between the two cases, they are analogies and nothing more . . .

In my judgment, if it be the fact that the freight was lost in this case because, although the ship could have been repaired and enabled F to complete the voyage, yet it would have cost more to effect such temporary repairs, allowing for general average contribution, than the repaired value of the ship, such loss did not arise from the fact, if it be the fact, that the cost of permanent repairs, allowing nothing for general average contribution, would have exceeded the sum of £11,000. G On the other hand, if it was not a matter of expense, if the ship could not have been rendered fit to complete the voyage with her cargo of timber, it may fairly be said that the loss of freight did, within the meaning of this clause, arise from the fact (if it be the fact) that there was a constructive total loss of the ship in the sense that total loss H appeared to be unavoidable and there was a physical impossibility of repair.

Solicitors : *Ince, Roscoe, Wilson & Glover* (for the plaintiff) ; *William A. Crump & Son* (for the defendant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

HULME *v.* BUCKLOW AREA ASSESSMENT COMMITTEE AND WILMSLOW RATING AUTHORITY.

[KING'S BENCH DIVISION (Charles and Humphreys, JJ.), **May 23, 24, 1940.**]

A *Rates and Rating—Assessment committee—Procedure—Inspection of property—Appeal to quarter sessions—Jurisdiction of quarter sessions—Rating and Valuation Act,* 1925 (*c.* 90), *ss.* 18 (3), 31 (1), (4).

In the course of a meeting of the assessment committee for the purpose of assessing a house, the committee decided that some of their members should inspect the property. They did so, and, at the time of the inspection, B the owner of the property was present and took no objection. The county valuation committee had authorised the county valuer to attend the meeting of the committee on behalf of the rating authority, and he attended for that purpose, and not as appearing for the county valuation committee. No notice was given of his intention to appear. The owner of the property appealed to quarter sessions upon grounds based on the above matters, but quarter sessions dismissed the appeal as being based C on grounds with which they had no jurisdiction to deal:—

HELD: (i) the assessment committee had no legal right to inspect property themselves, but no objection could be taken on this ground as the owner did not at the time object to the inspection.

(ii) a county valuer may attend a meeting of the assessment committee for the purpose of assisting the rating authority, and may do so without giving any notice of his intention to appear.

D (iii) the jurisdiction of quarter sessions upon such an appeal is restricted to the correctness of the valuation, and they cannot entertain any objection to the procedure of the assessment committee.

[**EDITORIAL NOTE.** The judgments in this case concern the procedure of assessment committees with regard to the inspection of property. Inspection is E no doubt a very proper aid in the assessment of property, but the committee themselves have no legal right to enter property for this purpose. If, however, they do so, and the owner raises no objection at the time, he cannot take any subsequent objection to the inspection. The Act allows the committee to appoint a valuer, who can inspect the property even against the wish of the owner. Irregularities in the procedure of an assessment committee are properly called in F question by an application for a writ of *mandamus* in the High Court, and not by an appeal to quarter sessions.

AS TO PROCEEDINGS OF ASSESSMENT COMMITTEE, see HALSBURY, Hailsham Edn., Vol. 27, pp. 470, 471, para. 900; and FOR CASES, see DIGEST, Vol. 38, p. 579, Nos. 1145-1147.]

G APPEAL by the ratepayer by way of case stated from the committee of justices of quarter sessions of the county of Chester relating to private property owned by the appellant known as Jalfra, Heyes Lane, Wilmslow, in the county of Chester. The facts are fully set out in the judgment of CHARLES, J.

H *G. G. Lind-Smith* for the appellant.

A. S. Comyns Carr, K.C., and *R. G. S. Bankes* for the respondents.

CHARLES, J.: The facts in this case are very short. On Feb. 11, 1938, the rating authority, who are the respondents, gave notice of a proposal to insert a property owned by the appellant in the valuation list for the first time. It was a new house. The house was entered in the list being assessed at £40 gross value and £30 rateable value. On Mar. 2, the appellant lodged a notice of objection, and contended that the house was rated too high, because it had a great many defects. He said that it was not properly sewered, that there was no street lighting, that it was a long way from the shopping centre, and that it had a poor omnibus service and no garage, and, having stated every possible objection, which would assist him towards the diminution of the amount at which his property was assessed, he appealed on those grounds. On Mar. 10, there was a meeting of the assessment committee, the respondents to this appeal, to determine the proposal and objection. There were 15 members present, and the county valuer was called as a witness. Evidence was called by the respondent rating authority, and, in the course of the hearing, the committee announced that they would inspect the property. They did not all go, but deputed 4 of their number to inspect this hereditament. So far as I can see, there is no statutory authority which compels an owner of property to permit an assessment committee to inspect it in that way. The assessment committee are enabled to appoint a valuer who is given the right, even against the assent of the owner, to enter upon the property and make a report. In this case, the matter does not arise because the owner offered no objection whatever to this inspection. On Mar. 31, having with the owner's assent inspected this property, the assessment committee met again to complete the hearing. There were then 9 members present. The subcommittee made their report, and the assessment committee decided to approve the proposal. In March the appellant gave notice of appeal from that decision to quarter sessions. Then, for some reason which is a little obscure, it was agreed between the appellant and the respondent assessment committee that the appeal should be withdrawn and the whole matter reheard *de novo*, and that course was, by agreement, adopted. On the rehearing the committee came to the same decision. The matter was then appealed to quarter sessions, and it is that decision of the quarter sessions which we are considering here.

The case made by the appellant on this case stated is that the committee were acting *ultra vires* in inspecting the house. I have dealt with that point. The inspection was not an inspection which had statutory authority, but, if the owner was there and did not object, then he cannot be heard afterwards to say that the entry upon his premises was wrong.

Another objection taken is, that the county valuation committee's valuer, acting in that behalf and as the valuer of that committee, gave evidence before the assessment committee, and that he was not entitled to do that, because, if the county valuation committee wanted to intervene and to appear in opposition and take an active part in the opposition, whether by counsel or by witnesses, the Rating and Valuation Act, 1925, s. 18 (3), lays down that they must give notice in writing to the occupier of their intention so to appear. So far as the case goes, it is stated that he did not appear for them, for it says:

> On Aug. 8, 1938, the rating and valuation sub-committee passed a resolution relating to the authorisation of [the county valuer] to act on behalf of the Wilmslow Rating Authority on the hearing before the Bucklow Area Assessment Committee of the said proposal.

Our attention has been drawn to the letter which the valuation committee's officer wrote to the county valuer, which is in exact accord with the matter which is so found in the case. He is asked to assist the rating authority, and not to go there and appear for the county valuation committee, and, that being so, no notice was necessary.

Before us, the respondent rating authority rely upon a finding by the quarter sessions as follows:

> We had no jurisdiction to hear an appeal on the grounds set out in the notice of appeal and argued by the appellant.

Those are the matters to which I have already referred, so one has to consider what the jurisdiction was. The jurisdiction of quarter sessions upon appeal is set out in the Rating and Valuation Act, 1925, s. 31, the effective portions of which are as follows:

> (1) Any person who appeared before the assessment committee on the consideration of an objection made before the committee under this part of this Act may, if he is aggrieved by the decision of the committee on the objection, appeal against the decision . . .

What is being considered is (i) whether or not this house shall be entered in the valuation list at all, and (ii) whether if it is entered in the valuation list, it should not be entered at a less figure than gross £40 and rateable £30, which was the figure arrived at by the rating authority as proper. What powers have quarter sessions when an appeal is made against such a decision? Sect. 31 (4) provides as follows:

> On an appeal under this section the court shall, as it thinks just, either confirm the valuation list or alter the valuation list to give effect to the contention of the appellant so far as that contention appears to the court to be well founded.

That is the limit of their authority, and, if the appellant had wanted to attack the propriety or conduct of the inquiry before the assessment committee, or the regularity of it, the proper way would have been by applying to this court for a writ of *mandamus* directing the authority to hear and determine in accordance with law. Then the whole matter would be open to him. He could argue that they had determined, not according to law, but with every conceivable irregularity, and then, if he had persuaded this court of that, a writ would have issued, and he would have had his remedy. As far as this appeal is concerned, I am quite clear that it should be dismissed with costs.

HUMPHREYS, J.: I am of the same opinion. I think that it is sufficient to begin the history of this matter on Sept. 2, 1938, when, as stated in the case, there came before the appropriate assessment committee a proposal by the rating authority to rate the premises in question at a certain figure, and at the same time an objection to that proposal raised by the occupier of the premises, the present appellant. That matter was heard by 10 members of the assessment committee. In regard to those 10 members, objections were made by the present appellant in this form. He objected to any members of the respondent assessment committee sitting who had taken part in a previous decision upon the same subject-matter. No argument has been addressed to us in support of any such grounds of objection. What we know is that there had been a previous hearing, that the hearing had resulted in a decision adverse to the appellant, that he had appealed to quarter sessions, and that for some reason or other with which we are not acquainted, it had been decided that the appeal and its subject matter should be expunged from the record and the whole matter begun *de novo*. There is no ground for saying that those persons who had taken part in the original hearing were not entitled to sit upon the subsequent hearing.

Then the appellant took this objection. He said that he objected to any members of the assessment committee then purporting or proposing to sit who had taken part in a visit of inspection to his premises, which had taken place before the previous decision. Charles, J., has dealt—and, I think, has dealt sufficiently—with that objection. As far as I am aware, there is not the smallest objection in law to an assessment committee, having heard evidence, reserving their decision in order that they may make themselves acquainted with the particular hereditament with which they have to deal, and, if they have that power, it appears to me to follow that they have the power to appoint a small number of their body to do so and to report to the whole body. The only statutory ground which is cited to us in support of this objection to the right of the assessment committee to inspect the property with the consent of the occupier of the property, who is a party to the proceedings, is the power to appoint a surveyor or valuer for the purpose of doing so, if they think it necessary. I think that there is nothing whatever in that point.

The next point which was taken was this. It was said by the appellant that he objected to the county valuer being called as a witness. That does not appear on the face of it to be a good objection, and the appellant had to go further, and say that the county valuer was in fact appearing on behalf of the county valuation committee. The statute provides that if the county valuation committee desire to intervene in such a matter and take a part in it, they must give certain notices. These are the words of sect. 18 (3) of the Act of 1925:

> A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act . . .

I think that a complete answer to this point is to be found in this way of looking at the matter. Supposing that somebody had challenged the county valuer and said, " You claim to be appearing here for the county valuation committee, who are entitled to appear if they have given

notice. What is your authority ? " the answer would have been, and must have been, " I have not any authority at all to appear for them," because he had none. The only authority he had was an authority contained in a letter, which, so far from saying that he was to appear on behalf of the county valuation committee, said in terms that he was not
A to appear for them, but was to appear for somebody else, and that he was to assist the local rating authority. It appears to me to be an objection which is based on a misinterpretation of the facts of the case, and it is not necessary to say any more about it.

Counsel for the respondents has said that, even if there were something
B to be said for those two points, quarter sessions rightly decided in this case—and this is a case stated by quarter sessions—that they had no jurisdiction themselves to entertain either of those questions. When one looks at the notice of appeal and the contentions upon that notice which are stated in the case, it appears that the one thing which the appellant
C did not contend was that his premises were wrongly rated. There is not a word to be found in his contentions indicating any reason why his premises should not be rated at £40 gross and £30 rateable. There are 8 contentions, and every one of them has relation to the proceedings and conduct of the assessment committee, and none to the subject-matter
D of the appeal. I think that the quarter sessions were perfectly right in holding that they had no jurisdiction to deal with the matter, and that all that they could do was to hear—as, indeed, the statute requires them to do on the appeal—evidence as to whether the court should confirm the valuation list or alter the valuation list, or, in other words,
E whether they should uphold the suggested assessment of £40 gross or £30 rateable or whether they should alter it in some way or other. The considerations which apply to that were never before them. As I have said, the only matters which were discussed before them on the part of the appellant, apparently, were an alleged impropriety in the
F conduct of the assessment committee. I think that they were right in saying that they could not decide upon such matters, although no doubt the High Court of Justice could have done so if there had been any substance in them. For those reasons, I agree that the appeal should be dismissed.

G *Appeal dismissed with costs.*

Solicitors : *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (for the appellant) ; *Church, Adams, Tatham & Co.*, agents for *Cobbett, Wheeler & Cobbett*, Manchester (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. & A. KOHNSTAMM, LTD. *v.* LUDWIG KRUMM (LONDON), LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 21, 1940.**]

Emergency Legislation—Trading with enemy—English company guaranteeing to another English company debt of enemy—Action on guarantee—Performing or discharging obligation of enemy—Transaction under which all obligations performed by plaintiff before commencement of war—Trading with the Enemy Act, 1939 (c. 89), *s.* 1 (2) (*a*) (iii).

The defendants, an English company, guaranteed the payment to the plaintiffs, also an English company, of all sums due to the plaintiffs in respect of goods supplied by the plaintiffs to a German company. Prior to the outbreak of war, goods to the value of £594 12*s.* 3*d.* were supplied by the plaintiffs to the German company. The plaintiffs sued on the guarantee, and the defendants contended that in paying this amount they would be guilty of the offence of trading with the enemy within the meaning of the Trading with the Enemy Act, 1939, s. 1 (2) (*a*) (iii) :—

HELD : (i) payment by one English company to another English company of this debt of an enemy in fulfilment of a contract of guarantee would not be a performance or discharge of an obligation of an enemy within the meaning of the Trading with the Enemy Act, 1939, s. 1 (2) (*a*) (iii). The words in the Act, "discharged any obligation," mean a complete discharge, and not, as in this case, a mere transfer of the obligation, which had still to be met by the German company.

(ii) as the goods had all been delivered prior to the outbreak of war, the company could not be deemed to have traded with the enemy by reason of the terms of proviso (ii) to subsection 2.

[**EDITORIAL NOTE.** In this case the goods had been delivered before the outbreak of war, and the only matter outstanding between the parties was that of payment. It is held that an English company which, in performance of its obligations under a contract of guarantee with another English company, makes this payment is not committing the offence of trading with the enemy, and the court points out that a contrary view would lead to the absurd result that, although a creditor might receive payment from the enemy, yet it could not receive payment from a British subject who had guaranteed the debt of the enemy. Although the obligation of the German company to pay the plaintiff was in fact discharged, another obligation, namely, to pay the guarantor, was thereby created, and it is held that such a transfer of the enemy's obligation cannot be a discharge within the meaning of the Act, which contemplates a complete discharge.

AS TO TRADING WITH THE ENEMY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 460-462, paras. 779, 780 ; and FOR CASES, see DIGEST, Vol. 2, pp. 169-173, Nos. 379-392.

FOR TRADING WITH THE ENEMY ACT, 1939, see BUTTERWORTHS' EMERGENCY LEGISLATION SERVICE, Statutes Volume, p. 558.]

Case referred to :

(1) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1937] 1 K.B. 534 ; [1936] 3 All E.R. 696 ; Digest Supp. ; 106 L.J.K.B. 437 ; 156 L.T. 4.

ACTION to recover the sum of £594 12*s.* 3*d.* due by the defendants to the plaintiffs in pursuance of a contract of guarantee in writing dated Jan. 22, 1936. The facts and arguments are fully set out in the judgment.

G. O. Slade and *V. K. Wolff* for the plaintiffs.

Cyril Salmon for the defendants.

MACNAGHTEN, J.: In this action, R. & A. Kohnstamm, Ltd., a company formed under the Companies Acts and dealing in leather, sue Ludwig Krumm (London), Ltd., another company formed under the Companies Acts and dealing also in leather, to recover the sum of £594 12*s.* 3*d.* as due from the defendants to them under a guarantee A given in Jan., 1936, whereby it is alleged that the defendants guaranteed a German company named L. Krumm Akt. in Offenbach, in Germany.

The plaintiffs have had dealings for a number of years with what I will call the German company, and the German company at some date, of which no evidence has been given, requested the defendant company B in London to act for them in the sale of their goods in the United Kingdom. It was a company limited by shares, with a capital of £3,000 divided into 3,000 ordinary shares of £1 each, and nearly all of those shares were held by the German company. In the course of business between the plaintiffs and the German company, the plaintiffs used to sell leather of various sorts C to the German company, and this the German company apparently manufactured at their factory at Offenbach. In Jan., 1936, the difficulties of trading with Germany being considerable, owing to the German legislation, the plaintiffs were unwilling to continue the business except upon a promise by the defendant company to be responsible for the debts D due from the German company to the plaintiffs. Accordingly, certain letters passed between the plaintiffs and the defendants. The plaintiff company wrote to the defendants on Jan. 21, 1936, as follows:

> Referring to our representative (Mr. Short's) call upon you this afternoon, we have noted with thanks your order for 6 dozen Black Lion brand chrome calf and E 1 dozen Brown Lion brand chrome calf at [the price mentioned]. We note to send these goods by Schenkers Express to your firm in Offenbach, but for regularity's sake beg to state (as already verbally mentioned by our representative) that we understand you to hold yourselves reponsible in every way for this and any further orders placed with us, as owing to the existing exchange difficulties we cannot accept orders from or for German clients without such guarantee from a firm domiciled in England. Your acknowledgement will much oblige.

F The answer to that on Jan. 22, 1936, signed by Krumm, one of the directors of the defendant company, was as follows:

> I beg to acknowledge receipt of your letter of Jan. 21, and would confirm again that this company holds itself responsible in every way for goods bought by our factory in Offenbach.

G The action is brought to recover the price of goods sold and delivered by the plaintiffs to the German company at Offenbach in July, 1939.

The first point which counsel for the defendants put forward was that, under the Trading with the Enemy Act, 1939, the defendants would be committing an offence under that Act if they were H to pay the money sued for in this action. The section under which he bases that argument is sect. 1 (2), which provides as follows:

> For the purposes of this Act a person shall be deemed to have traded with the enemy . . . (*a*) . . . if he has . . . (iii) . . . discharged any obligation of, an enemy, whether the obligation was undertaken before or after the commencement of this Act . . .

By paying the debt due from the German company to the plaintiffs, the defendant company would, as he said, be discharging the obligation of the German company, and, therefore, the case seemed to be clearly within the words of the section. It was argued that it might seem unreasonable that the Trading with the Enemy Act, 1939, should prevent one English company from claiming from another that which it had promised to pay, but such an argument, I think, is unnecessary if the A words are plain. If the meaning is plain, the court is not concerned with whether or not the results of the legislation may seem unfair. Moreover, the subsection has a proviso in the following terms:

> Provided that a person shall not be deemed to have traded with the enemy by reason only that he has—(i) done anything under an authority given generally or B specially by, or by any person authorised in that behalf by, a Secretary of State, the Treasury or the Board of Trade . . .

Thus, there would be no difficulty, in a proper case, in obtaining consent to do that which would otherwise be deemed to be trading with the enemy. However, in addition to that proviso, the subsection has a C second proviso, which is as follows:

> (ii) received payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving payment had been performed before the commencement of the war by reason of which the person from whom the payment was received became an enemy.

Therefore, the plaintiffs would not be deemed to have traded with the D enemy if they received payment of this debt of £594 12*s.* 3*d.* from the German company. In those circumstances, it seems to me that the provision in subsect. (2) (*a*) (iii) which provides that a person shall be deemed to have traded with the enemy if he has discharged any obligation of an enemy cannot apply to a case where an English company, E formed under the English law, having given a guarantee of the debt of an enemy, performs its obligation under the contract of guarantee, for it would lead to the absurd result that, although a creditor might receive payment from the enemy, yet it could not receive payment from a British subject who had guaranteed the debt of the enemy. F

Counsel for the defendants called my attention to a sentence in the judgment of LORD WRIGHT, M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (1), where he said of the position with which he was then dealing, at p. 544 ([1936] 3 All E.R., at p. 706):

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> The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal.

That is to say, the surety, discharging the duty of the principal himself, then becomes creditor of the principal for the amount which he has paid. Although in one sense the defendants in this case, by paying, in accordance H with the obligation into which they had entered under the contract of guarantee, discharge the German company from its obligation to pay the plaintiffs, they thereby create an obligation on the part of the German company to pay the same sum to them, the defendants, themselves, and I think that the words "discharged any obligation" in that section of the Trading with the Enemy Act, 1939, mean a complete discharge, not a mere alteration of the obligation to pay this sum of money from an obligation to pay it to A. into an obligation to pay it to B. The obligation of the German company—that is, the obligation of the enemy—has not been discharged. It still has to be met. The plaintiffs are entitled to recover the sum sued for in this action, and there will be judgment for that amount with costs.

Judgment for the plaintiff for £594 12*s.* 3*d. with costs.*

Solicitors: *Wordsworth, Marr Johnson & Shaw* (for the plaintiffs); *Buckeridge & Braune* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

ANDREWS *v.* ANDREWS (KING'S PROCTOR INTERVENING).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **May 1, 1940.]**

Divorce—Intervention after decree nisi—Discretion of court—Petitioner living in adultery prior to presentation of petition—No rule of universal application requiring petitioner to separate from illicit partner pending suit—Adulterous association not disclosed—Public policy.

A husband petitioned for divorce on the ground of his wife's desertion. Prior to presenting the petition he had, acting on legal advice, parted from a woman with whom he had entered into an adulterous association, and by whom he had had two children, but, at the woman's request, he resumed cohabitation with her before the petition was heard, and failed to disclose this fact to the court. In consequence of this non-disclosure, the King's Proctor intervened and asked that the decree should be set aside:—

HELD: the case was a proper one for the exercise of the court's discretion. There is no rule of universal application that an adulterous intercourse must always be broken off before a petition can be presented. Each case must depend upon its own circumstances. In the interests of public policy the decree was allowed to stand, notwithstanding the deception which the petitioner had practised.

[EDITORIAL NOTE. Where an intending petitioner for divorce has formed an illicit union, it has hitherto been the general view that it is imperative that that union shall be broken off as the petitioner must come into court with clean hands. This, however, is not an invariable rule. The court may exercise its discretion in the petitioner's favour, although such union is not broken off; but there must be substantial reasons for its continuance. Such reasons may be the poverty of the parties and the interests of children of the union.

AS TO DISCRETION OF COURT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 689-690, para. 1022; and FOR CASES, see DIGEST, Vol. 27, pp. 359-367, Nos. 3443-3538.]

INTERVENTION by the King's Proctor to set aside a decree *nisi* for divorce obtained on the ground of desertion. The parties were married in Aug., 1925, and the wife left the husband in 1930, after which he heard no more of her. In 1931 he entered into an adulterous association with a woman, and had two children by her, the second being born during these proceedings. On May 30, 1938, he filed a petition for divorce on the ground of his wife's desertion. In Mar., 1938, he had, on the advice of his solicitors, parted from the woman with whom he had been living. The petition was heard on Apr. 4, 1939, but at the request of the woman, the petitioner had resumed cohabitation with her in the previous November, and this resumption was not disclosed to the court on the hearing of the petition. The King's Proctor intervened to show cause why the decree *nisi* granted to the husband should be rescinded by reason of the non-disclosure of this resumption of cohabitation.

S. H. Noakes for the King's Proctor.

C. A. Marshall-Reynolds (for *Andrew Balfour* on war service) for the petitioner.

SIR BOYD MERRIMAN, P.: I do not wish to say anything which would discourage petitioners from breaking an adulterous association and coming before the court with clean hands, and in many cases that may be the right and proper thing to do. It may well be held to be a test whether the discretion should be exercised. However, that cannot be a rule of universal application, and, as I said in the course of the argument, I doubt the wisdom of giving advice, as it were, by rule of thumb, that an adulterous association must always be broken off before a petition can be presented. I have repeatedly had cases in which discretion has been asked for where there has been a long association, and the birth of children, and where in every respect except the actual legal relationship a new home has been set up, and is likely to continue indefinitely. In such circumstances, particularly when the people concerned are poor, and there is no real means of getting alternative accommodation, there may be something unreal in insisting on the association being completely broken off, with a view, nevertheless, to its being resumed the moment the decree has been made absolute. In other words, it must depend upon the circumstances of the case whether, in the first instance, any advice of that sort should be given, and, of course, ultimately, whether the discretion of the court should be exercised notwithstanding the fact that there has been no nominal change in the situation.

This case I regard as one of the class in which the temporary interruption of the association makes no real difference. These parties had been living together as man and wife. They had had a child already. Another was on the way and their one desire was to get married to each other as soon as possible. I cannot imagine, as I have already said, that, if those facts had all been put before the judge, he would have hesitated for a moment to exercise his discretion, any more than he did on the facts which were actually put before him. One is bound to regard as most reprehensible the conduct of this petitioner in deliberately deceiving the court, and public policy demands that that sort of deception should be discouraged in every possible way, but whether the decree should be

rescinded and the petition dismissed, must depend on the circumstances of the individual case. After considering this matter very carefully I have come to the conclusion that in this case the element of public policy, notwithstanding the deception which has been practised, is in favour of allowing the decree to stand. I think that it would be a
A misfortune if the prospect of this association turning into a happy married home were to be frustrated. All the evidence is one way about the devotion of these two people to each other and their desire to make an honest home together. I have to consider also the interests of the two small children who have already been born. I think, therefore, that in
B this case I should be doing wrong if I were to set aside the decree *nisi*, and I do not propose to do so. However, the King's Proctor's intervention has succeeded, and, of course, must be allowed, with costs.

Solicitors: *Treasury Solicitor* (for the King's Proctor); *Withers & Co.* (for the petitioner).

C [*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

KAY *v.* LOVELL.

D [CHANCERY DIVISION (Bennett, J.), **May 7, 1940.]**

Solicitors—Costs—Statutory lien or charging order—Funds in court to credit of partnership action—Extent of charge—Form of order—Solicitors Act, 1932 (*c.* 37), *s.* 69.

On an application by the solicitor for the plaintiff in a partnership action for a charging order on a fund in court for his costs of the action,
E the proper form of order is an order charging the property recovered with "the taxed costs, charges and expenses of the applicant properly incurred of and in reference to the action as solicitor."

[EDITORIAL NOTE. In *Re Clayton, Collins* v. *Clayton* (1) MORTON, J., restricted the charge to the costs incurred in recovering and preserving the property. That, however, was an administration action. In a partnership action the solicitor has
F always been and still is entitled to a charge for his costs of the action. It is clear that in an administration action many other matters than the preservation of a particular property may be dealt with.

AS TO STATUTORY LIEN AND CHARGING ORDERS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 252-261, paras. 275-282; and FOR CASES, see DIGEST, Vol. 42,
G pp. 290-298, Nos. 3250-3318.]

Case referred to:

(1) *Re Clayton, Collins* v. *Clayton*, [1940] 2 All E.R. 233; Digest Supp.

APPLICATION by the solicitors for the plaintiff in a partnership action for a charge under the Solicitors Act, 1932, s. 69, in respect of the costs
H of the action upon a fund in court to the credit of the action. The writ in the action was issued on Oct. 10, 1938, a receiver was appointed on Oct. 18, 1938, and a further receiver, to act jointly with the first receiver, was appointed on Apr. 18, 1939. On Mar. 16, 1939, the master made an order of the same kind as that asked for on this application for the applicant's costs down to that date out of a sum of £9,964 18*s.* 4*d.*, and

on Nov. 16, 1939, he made another similar order for costs to that date. The form of order sought on the application was that in Seton's Judgments and Orders, 7th Edn., Vol. II, p. 1044, Form 6. This form is headed, "Lien for costs declared on funds in court in partnership action. Stop order," and is in these terms:

> Order that C. D. be appointed to represent all creditors of the said firm for the purpose of this application; Declare that the applicant, as the solicitor lately employed by the plaintiff in the prosecution of this action, is entitled to a charge upon the shares and interest of the plaintiff and the defendant, and the said creditors, and of each of them respectively, of and in £—— in court to the credit of, etc., and of and in the balance in the hands of the receiver, for the taxed costs, charges and expenses of the applicant properly incurred of and in reference to this action as solicitor of the plaintiff, including the costs of this application. Reference to tax the said costs, with liberty to apply for payment. Stop order on funds in court in favour of applicant.

In view of the decision of Morton, J., on Mar. 12, 1940, in *Re Clayton, Collins* v. *Clayton* (1) that a charging order under sect. 69 should be limited to the costs properly incurred in recovering and preserving the money in court, the master doubted whether he could make an order in this case, so this application, made on Mar. 27, 1940, asked (i) that it might be declared that the applicants, as the solicitors engaged by the plaintiff in the prosecution of the action, were entitled to a charge on the sum of £9,964 18*s.* 4*d.* cash in court to the credit of the action for their taxed costs, charges and expenses as between solicitor and client of or in reference to the action properly incurred as such solicitors since Nov. 16, 1939, (ii) that it might be referred to the taxing master to tax those costs as between solicitor and client from the foot of the taxation directed by the order of Nov. 16, 1939, including therein their costs of and incidental to this application, (iii) that, out of that sum of £9,964 18*s.* 4*d.*, those costs, charges and expenses be paid to the applicants.

The Solicitors Act, 1932, s. 69, provides as follows:

> Any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, or for paying, the said costs out of the said property as they think fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor:
>
> Provided that no order shall be made if the right to recover the costs is barred by any statute of limitations.

E. M. Winterbotham for the applicants.

M. J. L. Beebee for the respondents.

Bennett, J.: I make an order in the terms of Seton's Judgments and Orders, 7th Edn., Vol. II, p. 1044, Form 6. This, I think, is the form of order which has been made for years in partnership actions. It is not an order which in any way restricts or limits the costs in respect of which the solicitor is entitled to a charging order under sect. 69 to costs of recovering and preserving the property. In an administration action, such as *Re Clayton, Collins* v. *Clayton* (1), it may be appropriate to make a different form of order because either party may have dealt with matters in no way connected with the recovery and preservation of property, but that does not seem to be so in the case of a partnership action.

Solicitors: *Glover, Scott & Apthorpe-Webb* (for the applicants); *C. R. Enever & Co.* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

NICHOLAS *v.* TAXES COMMISSIONER (VICTORIA).

[PRIVY COUNCIL (Viscount Caldecote, L.C., Viscount Sankey, Lord Thankerton, Lord Russell of Killowen and Lord Roche), **March 12, 13, 15, 18, April 25, 1940.**]

Privy Council—Australia—Income Tax—Capitalisation of profits—Allotment of bonus shares—Amount due on shares satisfied out of accumulated profits—Unemployment Relief Tax (Assessment) Act (Victoria) (No. 4171 *of* 1933), *s.* 4—*Income Tax Act (Victoria) (No.* 4309 *of* 1935), *s.* 2.

The appellant was a shareholder in a company incorporated and carrying on business in Victoria. The company had transferred undistributed profits to a reserve account, and later issued fully paid bonus shares to its members, the amount due in satisfaction on the shares being taken from the reserve account. The question in dispute was whether the appellant was properly assessed for unemployment relief tax and special income tax upon an amount including a sum representing the value of the bonus shares issued to him by the company. Under the general income tax law of the State of Victoria, a shareholder in a company is not chargeable to income tax in respect of dividends, but, under the Unemployment Relief Tax (Assessment) Act (Victoria), 1933, and the Income Tax Act (Victoria), 1935, he is liable to unemployment relief tax and special tax on " any dividend, interest, profit or bonus credited, paid or distributed to him by the company " :—

HELD: the appellant was properly assessed, as he had been credited with a dividend, profit or bonus from the profits of the company within the meaning of the Acts in question.

Inland Revenue Comrs. v. *Blott* (1) *distinguished.*

[EDITORIAL NOTE. It was held in *Inland Revenue Comrs.* v. *Blott* (1) that a bonus declared out of undistributed profits and satisfied by the issue of bonus shares was capital, and not income, in the shareholders' hands, and so escaped liability to sur-tax. It was sought to apply the principles laid down by the House of Lords in that case to the similar facts of the present case, but this argument has been rejected by their Lordships. They express the opinion that *Blott's* case (1) is distinguishable in view of the difference of the statutory provisions under consideration. In their opinion such an application by the company of an appropriate proportion of undistributed profits for the benefit of the shareholder as had here occurred was aptly described as crediting the shareholder with the amount necessary to render the shares fully paid, the source of the credit being profits of the company. The undistributed profits thus appropriated were, therefore, income.

AS TO UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, p. 289, para. 574; and FOR CASES, see DIGEST, Vol. 28, pp. 106-109, Nos. 657-670.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood,* [1921] 2 A.C. 171 ; 28 Digest 107, *663* ; 90 L.J.K.B. 1028 ; 125 L.T. 497 ; 8 Tax Cas. 101 ; *affg.*, [1920] 1 K.B. 114.

(2) *Swan Brewery Co., Ltd.* v. *R.*, [1914] A.C. 231 ; Digest Supp.

(3) *Income Tax Comr. (Bengal)* v. *Mercantile Bank of India, Ltd.*, [1936] A.C. 478 ; [1936] 2 All E.R. 857 ; Digest Supp. ; 105 L.J.P.C. 102 ; 155 L.T. 186.

(4) *Bouch* v. *Sproule* (1887), 12 App. Cas. 385 ; 9 Digest 176, *1124* ; 56 L.J.Ch. 1037 ; 57 L.T. 345 ; *revsg.* S.C. *sub nom. Re Bouch, Sproule* v. *Bouch* (1885), 29 Ch.D. 635.

(5) *Ooregum Gold Mining Co. of India* v. *Roper, Wallroth* v. *Roper*, [1892] A.C. 125 ; 9 Digest 293, *1821* ; 61 L.J.Ch. 337 ; 66 L.T. 427.

(6) *James* v. *Federal Comr. of Taxation* (1924), 34 C.L.R. 404 ; Digest Supp.

(7) *Webb* v. *Federal Comr. of Taxation* (1922), 30 C.L.R. 450.

APPEAL from a judgment of the High Court of Australia (LATHAM, C.J., RICH, STARKE, EVATT and MCTIERNAN, JJ.), dated Mar. 25, 1938, reversing a judgment of the Full Court of the State of Victoria (MANN, C.J., MACFARLAN and GAVAN DUFFY, JJ.), dated Sept. 1, 1937, upon a special case stated by JUDGE STRETTON, a judge of the county court of Melbourne under the provisions of the Income Tax Act (Victoria), 1928, s. 66. The facts are fully set out in the judgment of their Lordships delivered by LORD THANKERTON.

Rt. Hon. Sir William Jowitt, K.C., and *F. Heyworth Talbot* for the appellant.

J. M. Tucker, K.C., and *Reginald P. Hills* for the respondent.

LORD THANKERTON : This appeal arises out of a special case stated by a judge of the county court of Melbourne under the provisions of the Income Tax Act (Victoria), 1928, s. 66, and the question is whether an amount of £210,000 ought to be included in the assessment made upon the appellant for the year 1935-36 as part of his assessable income liable to unemployment relief tax and special tax, which are imposed respectively by the Unemployment Relief Tax (Assessment) Act, 1933, and the Income Tax Act, 1935, both being statutes of the State of Victoria. The determination of the question rests upon the proper construction of these two statutes. The appeal is by special leave from a judgment of the High Court of Australia, dated Mar. 25, 1938, which reversed a judgment of the Full Court of the Supreme Court of the State of Victoria, dated Sept. 1, 1937.

The relevant provisions of the Unemployment Relief Tax (Assessment) Act (Victoria) 1933, are as follows :

> 4. For the purposes of this Act—(*a*) in the case of any person who is a member or shareholder of a company registered in Victoria—any dividend interest profit or bonus credited paid or distributed to him by the company from any profit derived in or from Victoria or elsewhere by it ; or (*b*) in the case of any person ordinarily resident in Victoria, who is a member or shareholder of a company whether registered in Victoria or not and whether carrying on business in Victoria or not—any dividend interest profit or bonus credited paid or distributed to him by the company—shall be deemed to form part of the assessable income of that person.

The relevant provisions of the Income Tax Act (Victoria), 1935, are as follows:

> 2.—(1) . . . (*g*) In the case of any person (not being a company) whose taxable income within the meaning of this paragraph exceeds £100, there shall be payable (and whether or not in his case there is also payable the tax additional tax and further additional tax or any of them chargeable under the preceding provisions of this section) a special tax on the whole of the said taxable income of such person as hereinafter provided, that is to say [here follows a scale of rates graduated according to the total amount of taxable income]. For the purposes of this para. (*g*) of this subsect. . . . (*ii*) subject to the said para. (*g*), the taxable income within the meaning hereof of taxpayers hereunder shall be calculated and the amount of the special tax aforesaid payable by each taxpayer hereunder shall be assessed in like manner as the taxable income within the meaning of the Income Tax Acts (not including the said paragraph) of taxpayers is calculated under the said Acts and as the amount of the tax payable under the said Acts is assessed, and for the purposes of the said paragraph the provisions of the said Acts as modified by the said paragraph shall take effect—as if in calculating the exemptions provided for in sect. 21 of the Principal Act para. (*e*) of that section were omitted . . . as if in the Principal Act it were provided that—
>
> in the case of any person who is a member or shareholder of a company registered in Victoria—any dividend interest profit or bonus credited paid or distributed to him by the company from any profit derived in or from Victoria or elsewhere by it; and
>
> in the case of any person ordinarily resident in Victoria who is a member or shareholder of a company whether registered in Victoria or not and whether carrying on business in Victoria or not—any dividend interest profit or bonus credited paid or distributed to him by the company,
>
> is to be deemed to form part of the assessable income of that person. . . .

As regards the question in this appeal, neither party has suggested that there is any material distinction between the terms of the two Acts, the words immediately under construction being "any dividend interest profit or bonus credited paid or distributed to him by the company," and it is equally accepted that, in the case of a person ordinarily resident in Victoria, as the appellant is, these words relate to an application of the profits of the company.

The material facts may be summarised as follows. The appellant is a shareholder of Lorraine Investments Proprietary, Ltd., a company incorporated in Victoria in 1926 under the Victorian Companies Acts and carrying on business in Victoria. At the time of its incorporation, the company had a nominal share capital of £100,000 divided into 100,000 shares of £1 each. On Aug. 22, 1932, the nominal capital was increased to £500,000 by the creation of 400,000 new shares of £1 each. Prior to Aug. 29, 1934, the company issued 50,000 of these shares, and the same had been paid for in cash, and, on that date, the shares of the company were held as follows:

	Shares.
George R. Nicholas [the appellant]	29,995
Trustees of Betty, Lindsay, Nola and Hilton Nicholas	20,000
F. J. Davey	5
	50,000

On Aug. 22, 1932, the company in general meeting passed the following resolution:

> Resolved to transfer £122,505 from profit and loss appropriation account ex profits accumulated prior to June 30, 1932.

On Aug. 29, 1934, the company in general meeting passed the following resolution :

> Resolved to transfer the amount of £150,000 to reserve account and to distribute bonus shares out of reserve account to the full amount to credit of this account—namely, £350,000.

On Sept. 25, 1934, the directors of the company passed the following resolution :

> Resolved to allot the following shares in furtherance to resolution of shareholders :
> 50,001-260,000 to G. R. Nicholas.
> 260,001-400,000 to the trustees of Betty, Lindsay, Nola and Hilton.

Each of the above resolutions was carried in the presence of, and with the consent of, all the shareholders of the company. In the books of the company, journal entries and ledger account entries were made giving effect to these three resolutions. The unallotted capital account in the ledger shows that on Apr. 15, 1926, cash was paid for the 50,000 shares then issued, and, as regards the issue of 350,000 shares, there is an entry under date Sept. 25, 1934 : " By reserve account £350,000."

The parties are agreed that the shares were issued as fully paid. The sum of £350,000, which was applied in satisfaction of the amount due on the shares, was undistributed profits of the company, and the shares were distributed among the shareholders in proportion to their holdings in the company. 210,000 shares were issued to the appellant, and were at all material times of a value of £210,000.

The question stated by the county court judge for the opinion of the Supreme Court was as follows :

> Should the assessment of taxable income for the purposes of (i) special tax and (ii) unemployment relief tax, have included the said amount of £210,000 ?

Their Lordships are of opinion, on consideration of these facts, that a sum of £210,000 was credited to the appellant from the profits of the company within the meaning of the statutory provisions above quoted, and they agree with the views expressed by the majority of the High Court. This sum was, therefore, rightly included in the assessment of the appellant to unemployment relief tax and special income tax. It thus becomes unnecessary to consider the other view expressed by Gavan Duffy, J., of the Supreme Court of Victoria—namely, that the shares themselves were a bonus distributed or credited from profits within the meaning of the statutory provisions—and their Lordships express no opinion on this view.

There can be no doubt that the company applied a sum of £210,000 from undistributed profits in satisfaction of the amount of the liability which would otherwise have rested on the appellant on the allotment of the 210,000 shares, which was made with his consent, and thus, by the action of the company, the appellant received a benefit in the issue to him of shares credited as fully paid, by an application of undistributed profits. In the second place, the distribution of the shares and the application of undistributed profits were among the shareholders only, and were in proportion to their holdings in the company, and the application of undistributed profits was also in those proportions, and, therefore, in the proportions which would regulate the distribution of a dividend. In their Lordships' opinion, such an application by the A company of an appropriate proportion of undistributed profits for the benefit of the shareholder is aptly described as crediting the shareholder with the amount necessary to render the shares fully paid, the source of the credit being profits of the company.

It is said that this conclusion is inconsistent with the principles laid B down by the House of Lords in *Inland Revenue Comrs.* v. *Blott* (1). In the first place, it must be observed that that decision proceeded on different statutory provisions, and it requires to be shown that the reasoning of the decision is clearly applicable to the Victorian statutes here in question. That such need for care is required is well illustrated C by the comments in *Blott's* case (1) on the decision of this Board on a Western Australian statute in *Swan Brewery Co., Ltd.* v. *R.* (2), the limits of which were further discussed in *Income Tax Comr.* (*Bengal*) v. *Mercantile Bank of India, Ltd.* (3). As stated by ROWLATT, J., in *Blott's* case (1), at p. 133:

> D What I do lay stress on is that one has to look for a "payment." Now I do not think that there is a payment of a dividend to a shareholder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it, and he takes it. If, in this case, the company could have found means to capitalise their profits and divide them as capital without adopting the machinery of declaring a bonus and allotting shares by agreement (not, be it observed, a voluntary agreement) in satisfaction of such bonus, I do not think E the case would have been arguable. I am asked to decide that there was a "payment" of this bonus upon the strength of what I consider bare machinery. I cannot do so. The fact is simply that the shareholder was given shares instead of a bonus.

The decision of ROWLATT, J., was affirmed by the Court of Appeal and by the House of Lords, and the reasoning of the majority in the House F of Lords follows that of ROWLATT, J. LORD HALDANE says, at p. 184:

> My Lords, for the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in G paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholder at all.

Then VISCOUNT FINLAY says, at p. 194:

> The resolution of Feb. 8, 1915, was, that for the purposes of capitalising H £33,333 6*s*. 8*d*., part of the undivided profits of the company, a bonus on each of the issued ordinary shares be declared, and that the directors be authorised to satisfy such bonus by the distribution among the members holding ordinary shares of 33,316 of the unissued second preference shares of £1 each, credited as fully paid up. The effect of this operation was that the amount of the bonus was retained by the company as additional capital, and that the shareholders got the new preference shares. No option was left to any particular shareholder. He was compelled by the action of the company to take the preference shares. He could not have sued for the bonus in money, as the resolution which gave

> the bonus *uno flatu* declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems to me impossible to treat the shareholders for the purpose of super-tax as having received the bonus and paid it back to the company to be retained as capital. They never received it at all.

He then quotes with approval the passage already quoted from the judgment of ROWLATT, J. VISCOUNT CAVE states, at p. 200:

> A The resolution did not give to any shareholder a right to sue for the dividend in cash, his only right being to have an allotment of fully-paid shares in the capital of the company. The profits remained in the hands of the company as capital, and the shareholder received a paper certificate as evidence of his interest in the additional capital so set aside. The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets . . .

These statements may be summarised as follows. Although in form B
a dividend was declared, it was inevitably at once applied to payment of the capital sums which the shareholders would otherwise have had to contribute. The share of profits so applied was never in the hands of the shareholder, nor had he ever a right to sue for it. Therefore, in no sense could the shareholder be said to have received payment, or to have C
had the right to demand payment, of a share of the profits, which, in such an event, would have formed part of his income for the purposes of British super-tax.

It seems equally clear, however, that the learned Lords accepted the view that the shareholder was credited with the discharge by such D
payment of his liability for payment in full on allotment. LORD HALDANE refers to the application of the profits [p. 184]:

> . . . in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute.

In another passage, he refers to [pp. 187, 188]: E

> . . . the case of a company using a reserve over which it had full power of disposition, in order to make payments out of it for the benefit of the existing shareholders of capital sums which they would otherwise have had to contribute for the purchase of new shares.

Again, VISCOUNT FINLAY refers to the satisfaction of the bonus by distri- F
bution of the shares "credited as fully paid up." This is made even clearer, however, by their statements that the principles laid down in *Bouch* v. *Sproule* (4) were equally applicable in *Blott's* case (1). In that case, not only was a dividend declared but a dividend warrant for the money amount of the dividend was sent to each shareholder, although G
the shareholder was bound, under the terms of the resolution, to sign and return the warrant, which contained an authority from the shareholder for the application of the amount of the warrant in payment of the call on the shares. Clearly, in the opinion of their Lordships, in that case the dividend, even if not "paid" or "distributed," was "credited" H
to the shareholder from the profits of the company, and the fact that the credit was used for the discharge of a capital liability, however relevant in a question of British super-tax, is not relevant in the case of the Victoria statutes, under which it is to be deemed to form part of his assessable income.

Their Lordships would add that the decision of the House of Lords in *Ooregum Gold Mining Co. of India* v. *Roper* (5) was before the House in *Blott's* case (1), and it cannot be taken that the learned Lords who formed the majority in the latter case intended to lay down any principle which was inconsistent with the earlier decision, in which it was made A clear that liability for the amount due on the issue of shares is on the allottee, and the liability must be satisfied from some source external to the company, in money or in money's worth, an example of which might consist of the discharge of the company's legal indebtedness for goods supplied or services rendered by the allottee, but that would B mean crediting the allottee with the sum due by the company, and, with his consent, applying the credit in discharge of the allottee's liability on the shares. In this view, it was correct, in *Blott's* case (1), to treat the shareholder as credited with the amount of the dividend, although he had no right to get the amount into his hands or to sue C for it. Their Lordships are, therefore, of opinion, not only that *Blott's* case (1) is distinguishable from the present case, in view of the difference of the statutory provisions under consideration, but also that the reasoning of the opinions in *Blott's* case (1) is helpful in illustrating the contrast between the two cases.

D On the other hand, the Australian Federal legislation is nearly akin to the Victorian statutes as regards the matter under consideration. Their Lordships desire to make it clear, however, that they consider that the meaning of the provisions of the Victorian statutes under consideration is clear and unambiguous, and they do not find it necessary to consider E their historical genesis, or to trace their parentage to the Federal legislation of 1915, or to the decision of the High Court in *James* v. *Federal Comr. of Taxation* (6). The decision in *James's* case (6), however, is helpful as regards the meaning of the words "dividends, interest, profits, or bonuses credited or paid" to a shareholder. The decision was F unanimous, and *Blott's* case (1) was discussed and distinguished on grounds similar to those already expressed by their Lordships. In the present case, the majority of the judges base their decision on the reasoning in *James's* case (6), and their Lordships agree with their views, and in particular with the analysis of *James's* case (6) made by RICH, J. The G earlier case of *Webb* v. *Federal Comr. of Taxation* (7) related to a distribution in the winding up of the old company—which had been reconstructed—of shares in the new company, which formed part consideration for the latter company's purchase of the undertaking of the old company, and these facts led to a contrary result to that in *James's* case (6), but H similar views were expressed as to the proper construction of the Act of 1915. Their Lordships are of opinion that a dividend, profit or bonus of £210,000 was credited to the appellant from the profits of the company, and that the question stated by the county court judge should be answered in the affirmative. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed and that the judgment of the High Court of Australia, dated Mar. 25, 1938, should be affirmed. The appellant will pay the respondent's costs in the appeal.

Appeal dismissed with costs.

Solicitors: *Stafford Clark & Co.* (for the appellant); *Freshfields, Leese & Munns* (for the respondent).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*] A

S. & A. SERVICES, LTD. *v.* DICKSON.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **May 27, June 3, 1940.**] B

Emergency Legislation—Taking possession of property—Judgment for delivery up of chattel to which plaintiff contractually entitled—Issue of writ of delivery—Whether leave of court necessary before obtaining judgment and issue of writ—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*).

The plaintiff hired a motor car to the defendant under a hire-purchase agreement. The defendant having subsequently made default in payment of the rent due under the agreement, the plaintiff terminated the agreement and issued a writ claiming possession of the car. Judgment for possession was obtained, and an application was made for a writ of delivery. It was thereupon contended on behalf of the defendant that the leave of the court was necessary under the Courts (Emergency Powers) Act, 1939, before the writ of delivery could issue:— C D

Held: the plaintiff was entitled, without the leave of the court under the Courts (Emergency Powers) Act, 1939, both to bring, and to obtain judgment in the action for possession of the chattel, and then execution by writ of delivery. He would not, however, be entitled, without the leave of the court, to seize the chattel himself.

[EDITORIAL NOTE. The Courts (Emergency Powers) Act, 1939, s. 1 (2) bars a person from proceeding to exercise the powers known as self-help without first obtaining the leave of the court. There is nothing in the Act, however, which bars the bringing of an action for the recovery of a chattel, nor the issuing of execution (i.e., by way of writ of delivery) appropriate upon a judgment in such a case. E

As to the Courts (Emergency Powers) Act, 1939, s. 1 (2), see BUTTERWORTHS' EMERGENCY LEGISLATION, Statutes Volume, p. 207.] F

Appeal by the defendant from an order of Cassels, J., dated Apr. 30, 1940.

The plaintiffs hired to the defendant a motor car under a hire-purchase agreement, dated Apr. 13, 1939. The defendant made default in payment of the rent due under the agreement, and the plaintiffs consequently terminated the agreement and then became entitled to resume possession of the car. A writ was issued by which the plaintiffs claimed possession. No appearance was entered by the defendant, there being no defence to the action, and judgment for the return of the car was entered on Mar. 14, 1940. An *ex parte* application for a writ of delivery was then made under R.S.C., Ord. 48, r. 1, and an order was made accordingly on Apr. 5, 1940. The defendant then entered an appearance and applied that the order should be set aside, on the ground that it was necessary, before such an order could be made, to obtain the G H leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1. An order was made on Apr. 23, 1940, that the order of Apr. 5, 1940, should stand. An appeal from the order of Apr. 23, 1940, was dismissed by CASSELS, J., on Apr. 30, 1940, and from that order this appeal was brought. The point at issue was whether or not, on the A true construction of the Courts (Emergency Powers) Act, 1939, s. 1, the leave of the court was necessary before the writ of delivery could issue.

G. O. Slade for the appellant.

A. Melford Stevenson for the respondents.

B CLAUSON, L.J. [delivering the judgment of the court]: The plaintiff obtained a judgment against the defendant for the delivery up of a motor car. He obtained that judgment because he was by contract entitled to call upon the defendant, in the events which occurred —namely, the failure to make certain agreed payments in respect of the C purchase of the car—to deliver up the car to him. Having obtained this judgment, the plaintiff applied to the court for the issue (to which, save for the applicable provisions, if any, of the Courts (Emergency Powers) Act, 1939, he was entitled *ex debito justitiæ*) of a writ of delivery. He obtained his order in the usual way *ex parte*. The defendant there-D after sought to have the *ex parte* order discharged, on the ground that, on the true construction of the Courts (Emergency Powers) Act, 1939, s. 1 (2), the court was precluded from ordering issue of the writ of delivery save in pursuance of an order obtained under that subsection, or, to put the matter in different form, that the plaintiff was precluded from E applying to the court to issue the writ of delivery without first obtaining an order under that subsection. In this contention, the defendant failed before the master and before the judge, and he appeals to this court.

The point at issue is, accordingly, the question of the true meaning of the following words in subsect. (2):

F

> . . . a person shall not be entitled, except with the leave of the appropriate court:—
> (*a*) to proceed to exercise any remedy which is available to him by way of . . .
> (ii) the taking of possession of any property . . .

The appellant argues that, when the plaintiff applied to the court to order the issue of the writ of execution, he was proceeding to exercise G a remedy which was available to him by way of taking possession of the car. In our judgment, the words, as a mere matter of English, do not bear the construction which the appellant asks this court to place on them. The application to the court to use its powers to remedy the grievance suffered by the plaintiff by reason of the defendant retaining H possession of the plaintiff's car without paying for it appears to us to be crucially different from an exercise of a remedy by the plaintiff himself. The succeeding words appear to us powerfully to enforce this argument. To ask the court to order the sheriff to seize the car and deliver it to the plaintiff is one thing, but for the plaintiff to exercise his remedy by taking possession of the property seems to us to be quite another thing.

When the court has exercised its remedial jurisdiction, the plaintiff will receive possession of the property from the court's officer. To describe the process under which the plaintiff receives an article from the court's officer as a process of taking the article appears to us to be a misuse of language.

The matter does not stop there, however. Upon examination of sect. 1 of the Act, it appears that subsect. (1) and subsect. (3) are directed to placing control upon a plaintiff who seeks to enforce certain judgments of the character there enumerated. Had the legislature intended to place control upon a plaintiff who seeks to enforce judgment for delivery of a chattel, nothing would have been easier than to include such a judgment among those enumerated in those subsections. The legislature has not done so. Subsect. (2) (*a*) appears to be directed to a wholly different matter—namely, to placing control upon a person who seeks to exercise certain remedies available to him, such remedies being grouped under five sub-heads. We need not enumerate them, but it is obvious that those numbered (i), (iii) and (v) cannot be otherwise than extra-judicial remedies. We can see no ground for suggesting that that numbered (iv) is other than extra-judicial. We should expect to find that the remedies numbered as (ii)—namely, "the taking of possession of any property or the appointment of a receiver of any property"—would be extra-judicial remedies, and, as we have already implied above, the language is clearly consistent with—and, in our judgment, consistent only with—those remedies being extra-judicial. Subsect. (2) (*b*) deals specifically with the institution of proceedings, and does not seem to throw further light on the matter.

It was ingeniously argued for the appellant that proviso (*d*) afforded a ground for finding some special implication in the relevant words appearing in subsect. (2) (*a*). With the greatest respect for an argument of such subtlety that we find it difficult to be sure that we are doing it full justice, we can find no such implication. Proviso (*d*) would appear to be a perfectly clear proviso limiting subsect. (2) (*b*).

It was pointed out, and perfectly correctly, that, as we construe the section, a man who is contractually entitled to delivery of a chattel is controlled in regard to his right to seize it himself, but is quite free, without any control, to obtain a judgment for delivery of the chattel and then actual delivery of it. The result, it is said, will be that a claimant to a chattel will not seize it himself, but will procure it through the machinery of an action. That seems to us to be so. Why the legislature left the matter in this position it is not for us to inquire if on the enactment itself we can find no difficulty of construction. The appeal fails, and will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Rollit, Sons & Haydon* (for the appellant); *Goulden, Mesquita & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

WOLSTANTON, LTD., AND DUCHY OF LANCASTER *v.* NEWCASTLE-UNDER-LYME BOROUGH COUNCIL.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **April 16, 17, 18, May 30, 1940.**]

A *Mines—Working of mines—Letting down surface without compensation—Plea of custom or prescription—Invalid plea.*

In a defence to an action for an injunction to restrain the defendants from so working their mines as to let down the surface, and thus damage the plaintiffs' property, the defendants pleaded, *inter alia*, both a custom and a right by prescription to work their mines so as to let down the surface without making compensation :—

B HELD : (i) the decision in *Hilton* v. *Granville* (*Lord*) (2) ought to be followed, and the custom alleged was, therefore, oppressive, unreasonable and void.

(ii) quite apart from the decision in *Hilton* v. *Granville* (*Lord*) (2), the custom alleged was in fact unreasonable, and, therefore, void.

Order of Court of Appeal ([1939] 3 All E.R. 597) *affirmed.*

C [**EDITORIAL NOTE.** The Court of Appeal held, following the decision in *Hilton* v. *Granville* (*Lord*) (2), that the custom contended for was unreasonable and invalid, and that there was no ground for disturbing this decision, which had stood for so many years as a decision of a court of high authority. In this conclusion they have been upheld by the House of Lords, who have, in addition, expressed the opinion that, even apart from that decision, the alleged custom was in fact unreasonable, and, therefore, void. D

AS TO CUSTOM TO CAUSE SUBSIDENCE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 629, 630, para. 1359 ; and FOR CASES, see DIGEST, Vol. 34, p. 711, Nos. 961-966.]

Cases referred to :

(1) *Hilton* v. *Granville* (*Lord*) (1841), Cr. & Ph. 283 ; 34 Digest 714, *987* ; 10 L.J.Ch. 398. E

(2) *Hilton* v. *Granville* (*Lord*) (1844), 5 Q.B. 701 ; 34 Digest 703, *923* ; 13 L.J.Q.B. 193 ; 2 L.T.O.S. 419 ; *subsequent proceedings* (1848), 12 Q.B. 737, n.

(3) *Broadbent* v. *Wilks* (1742), Willes, 360 ; 17 Digest 14, *117* ; *affd. sub nom. Wilkes* v. *Broadbent* (1745), 2 Stra. 1224.

F (4) *Dixon* v. *White* (1883), 8 App. Cas. 833 ; 34 Digest 708, *946*.

(5) *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348 ; 34 Digest 613, *121* ; 30 L.J.Q.B. 49 ; 2 L.T. 642 ; *affg.* (1857), 8 E. & B. 123.

(6) *Buchanan* v. *Andrew* (1873), L.R. 2 Sc. & Div. 286 ; 34 Digest 704, *926*.

(7) *Blackett* v. *Bradley* (1862), 1 B. & S. 940 ; 34 Digest 711, *963* ; 31 L.J.Q.B. 65 ; 5 L.T. 832.

G (8) *Gill* v. *Dickinson* (1880), 5 Q.B.D. 159 ; 11 Digest 64, *900* ; 49 L.J.Q.B. 262 ; 42 L.T. 510.

(9) *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H.L.Cas. 692 ; 17 Digest 14, *114* ; 34 L.J.C.P. 222 ; 4 L.T. 849.

(10) *Wilson* (*Lady*) v. *Willes* (1806), 7 East., 121 ; 11 Digest 17, *185*.

(11) *Buccleuch* (*Duke*) v. *Wakefield* (1870), L.R. 4 H.L. 377 ; 34 Digest 704, *927* ; 39 L.J.Ch. 441 ; 23 L.T. 102. H

(12) *Love* v. *Bell* (1884), 9 App. Cas. 286 ; 34 Digest 708, *947* ; 53 L.J.Q.B. 257 ; 51 L.T. 1 ; *affg.* S.C. *sub nom. Bell* v. *Love* (1883), 10 Q.B.D. 547.

(13) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A.C. 305 ; 34 Digest 705, *934* ; 75 L.J.Ch. 541 ; 94 L.T. 795 ; *affg.* S.C. *sub nom. Bishop Auckland Industrial Co-operative Society, Ltd.* v. *Butterknowle Colliery Co., Ltd.*, [1904] 2 Ch. 419.

(14) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1910] A.C. 381; 34 Digest 706, *940*; 79 L.J.Ch. 411; 102 L.T. 609; *affg.*, [1909] 1 Ch. 37; *revsg.*, [1908] 2 Ch. 475.

(15) *Angus* v. *Dalton* (1877), 3 Q.B.D. 85; 17 Digest 10, *61*; 47 L.J.Q.B. 163; 38 L.T. 510; *revsd. on other grounds* (1878), 4 Q.B.D. 162; *sub nom. Dalton* v. *Angus* (1881), 6 App. Cas. 740.

(16) *Rowles* v. *Mason* (1612), 2 Brownl. 192; 17 Digest 6, *18*. A

(17) *Lockwood* v. *Wood* (1844), 6 Q.B. 50; 17 Digest 4, *6*; 13 L.J.Q.B. 365; 3 L.T.O.S. 139.

(18) *Gateward's Case* (1607), 6 Co.Rep. 59b; 17 Digest 5, *17*.

(19) *Tyson* v. *Smith* (1838), 9 Ad. & El. 406; 17 Digest 4, *5*.

APPEAL from an order of the Court of Appeal (CLAUSON, LUXMOORE B and GODDARD, L.JJ.), dated July 4, 1939, and reported [1939] 3 All E.R. 597, affirming an order of FARWELL, J., dated May 24, 1939, and reported [1939] 3 All E.R. 190. The facts and the arguments are fully set out in the opinion of VISCOUNT MAUGHAM.

R. F. Roxburgh, K.C., and *J. Leonard Stone* for the first appellants. C

Sir Herbert Cunliffe, K.C., *Hon. Charles R. R. Romer, K.C.*, and *A. Andrewes Uthwatt* for the second appellant.

C. E. Harman, K.C., and *Wilfrid M. Hunt* for the respondents.

VISCOUNT MAUGHAM: My Lords, in 1841, one Hilton, who owned D some houses which were alleged to be copyhold of the manor of Newcastle-under-Lyme, which belonged to the Crown in right of the Duchy of Lancaster, started proceedings in Chancery to restrain the Earl of Granville, lessee from the Crown, from working his mines of coal and ironstone so as to injure the plaintiff's premises and houses by subsidence. E The recent workings, it was stated, had created great alarm and anxiety amongst the copyholder proprietors within the townships of Hanley and Shelton, the greater part of which were within the manor. The motion for an injunction came on for hearing before LORD COTTENHAM, L.C.: *Hilton* v. *Granville* (*Lord*) (1). The defendant F set up a custom, and also a prescriptive right, to work the mines under the copyholds of the manor making a reasonable compensation to the tenants for the use of the surface and damage to the surface by the working, but without making compensation in respect of the surface on any other account, and without making compensation for any G damage occasioned to any buildings on the surface. LORD COTTENHAM, L.C., was unwilling to grant an injunction which might have had the effect of stopping the mining operations, but he directed the motion to stand over, the plaintiff undertaking to bring an action at law for the purpose of trying the right claimed by the defendant. H

Litigation in those days was conducted with dignified leisure, and it was not till 1844 that the legal question came on for hearing before the Queen's Bench in *Hilton* v. *Granville* (*Lord*) (2). The judges were LORD DENMAN, C.J., and PATTESON, COLERIDGE and WIGHTMAN, JJ. The custom was set up in the pleading of the defendant, and a claim on a prescription was also pleaded. There were two demurrers. The arguments on both sides are elaborately reported. It is worth noting that counsel for the plaintiff was not allowed to argue that the lord could not prescribe against his copyhold tenant, because it did not appear on the pleas that the premises were in fact copyhold, and the case was ultimately decided on the footing that the action was one on the case for injuring two ancient houses in the manor, one occupied by the plaintiff and one by his tenant. The judgment of the court was delivered by LORD DENMAN, C.J., and was based on the ground that, whether the pleas demurred to related to a prescription or a custom, they could not be sustained at law, because they were unreasonable. The question whether the houses were freehold or copyhold was stated as not affecting the case.

Your Lordships are now asked to hold that *Hilton* v. *Granville* (*Lord*) (2) was wrongly decided in a case where the same custom is set up by a tenant of the Crown in relation to the same manor of Newcastle-under-Lyme. It is therefore necessary to examine *Hilton's* case (2) with care, and to see how it has been dealt with when it has been cited in subsequent cases. Such a decision as to the local law of the lands within a manor ought not to be disturbed after over 90 years without very good reason.

My Lords, the Court of Queen's Bench, in deciding that the custom was unreasonable, approved and relied on the authority of a case decided nearly a century before, which, as will be seen, has been accepted as good law in this House. The case relied on was *Broadbent* v. *Wilks* (3). If *Hilton's* case (2) comes within the principle of *Broadbent* v. *Wilks* (3), the former cannot be impeached. I will therefore mention the material facts in *Broadbent* v. *Wilks* (3). The custom there alleged was a custom for the lord of the manor and his tenants to cast the slate and other rubbish coming from the working of coal-mines upon the lands near to the pits belonging to customary tenants of the manor. It was held by the courts that this custom was bad, as being unreasonable, and also as being uncertain. We are not concerned with the question of uncertainty, which was mainly based on the word "near," but the point as to unreasonableness was decided by LEE, C.J., on the ground that the custom might deprive the tenant of the whole profits of his land. The case was removed by writ of error into the Court of King's Bench, and there it was argued several times, but the judgment in the end (in 1745) was unanimously affirmed. LEE, C.J., held that the custom was not reasonable, inasmuch as it laid a great burden on the land of the plaintiff without any consideration appearing, either public or private, and also because it savoured of an arbitrary power, and might totally deprive the tenant of the benefit of the land.

Returning to *Hilton's* case (2), I observe that LORD DENMAN, C.J., in delivering the judgment, cited *Broadbent* v. *Wilks* (3) at some length, and went on to observe that the custom pleaded in the case before the court was far more oppressive than that which was thus deliberately condemned by both courts in *Broadbent* v. *Wilks* (3). He referred to one or two other cases, and concluded by saying, at p. 730 :

> . . . a claim destructive of the subject-matter of the grant cannot be set up by any usage.

The subsequent history of the litigation between Hilton and Lord Granville is shortly stated in a note at the end of the report of *Hilton* A v. *Granville* (*Lord*) (2). It is sufficient for my purpose to say that the decision was never brought before a court of error, and, subject to a qualification which must now be stated, the case is still a binding authority in inferior courts. It is true, however, that LORD DENMAN, C.J., went on to say that, if the grant of the ancient houses could be produced B reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and void, and he said that the custom pleaded had that destructive effect. This view was not so absurd as it sounds at the present time, for, as LORD BLACKBURN states in *Dixon* v. *White* (4), at p. 843 : C

> . . . the contrary has now been established, though not in England finally, till *Rowbotham* v. *Wilson* (5), in 1860, and not perhaps in Scotland till *Buchanan* v. *Andrew* (6), in 1874.

In my opinion, this erroneous view of the effect of a reservation by a grantor of a right which might involve the destruction of the surface D granted does not seriously impair the authority on the point of unreasonableness of the decision of *Hilton* v. *Granville* (*Lord*) (2).

A somewhat similar matter came before the Court of Queen's Bench on demurrer in *Blackett* v. *Bradley* (7). The custom there alleged was to work under the waste lands of the manor without paying com- E pensation for subsidence. The court consisted of COCKBURN, C.J., WIGHTMAN and BLACKBURN, JJ., and strangely enough those eminent judges accepted without comment an express admission by the defendant's counsel that the case was indistinguishable from *Hilton's* case (2). This was a mistake, since an alleged custom to mine under F the copyhold and other tenements of the manor might be bad, and such a custom confined to the waste of the manor might be good : see *Gill* v. *Dickinson* (8). However, the court was left to decide whether or not *Hilton's* case (2) was good law, or at least binding on the court. COCKBURN, C.J., delivered the judgment, and, after stating that the G authority of the case was to some extent impaired by the mistaken view as to the effect of a hypothetical grant reserving a right to let down the surface, and observing that the decision itself had not met with the universal approval of the profession, he went on to say, at p. 955 :

> At the same time it is equally clear that, though the reasoning of this court in H *Hilton* v. *Granville* (*Lord*) (2) has been impugned, the decision in that case has not been overruled . . .

He also said that they considered themselves bound by it. Incidentally, it should be noted that during the argument BLACKBURN, J., observed, in relation to the argument that the lord of the manor might have made a grant to the copyholders reserving the right claimed, that the answer to that might be that, though the parties might legally have made such a compact, it would not be reasonable to *presume* that they had done so. This view seems to have been adopted in the important case which is next to be considered.

Hilton v. *Granville* (*Lord*) (2) came up for discussion in this House in *Salisbury* (*Marquis*) v. *Gladstone* (9), and it is necessary to refer to this authority in some detail, since it seems to be the only modern case in which this House has considered the question of the validity of a custom set up as between the lord of a manor and his copyhold tenants. The plaintiff in that case was the lord claiming in ejectment for a forfeiture against a copyholder of inheritance for digging and taking clay from his copyhold tenement and selling the same off the manor, and the defendant justified his acts under a custom for copyholders of inheritance to do so without limit. The custom was held to be reasonable. Sir Hugh Cairns appeared upon the appeal to this House for the plaintiff, the lord of the manor, and he cited *Hilton's* case (2), and no one seems to have impugned its authority. On the contrary, LORD CRANWORTH appears to have accepted it as a correct decision, and the other two noble Lords who sat upon the hearing, LORD WENSLEYDALE and LORD CHELMSFORD, said nothing to impugn that decision. The opinion of LORD CRANWORTH at first sight seems to be a little puzzling. He begins by saying that he cannot attribute much weight to the argument that a custom which would enable the copyholder to remove the whole of the clay off his lands, parcel of the manor, would be unreasonable, as tending to the destruction of those lands. The relation between the lord and his copyholders must be thought to have its origin in remote times by agreement between the lord, as absolute owner of the whole manor, and those whom he was content to allow to occupy portions of it as his tenants at will. Whatever restrictions, therefore, the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant or of the tenants to stipulate for. So far, it would appear to the reader that LORD CRANWORTH was about to come to the conclusion that copyhold customs set up by the lord could never be held to be unreasonable. However, he did not mean this, for he went on to observe, at p. 701:

> . . . that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom.

He then proceeded to distinguish the case from three other cases where the custom relied upon had been held to be unreasonable, and, therefore, bad. Those were *Broadbent* v. *Wilks* (3), which I have already mentioned, *Wilson* (*Lady*) v. *Willes* (10), a decision of LORD ELLENBOROUGH that the custom in question was bad as being indefinite and uncertain, and, thirdly, *Hilton* v. *Granville* (*Lord*) (2). As to the last case, he observed, at p. 702:

> Nor is it a custom like that insisted on by the lord in *Hilton* v. *Granville* (*Lord*) (2), which would have enabled the lord to undermine the houses of the copyholders, and, without any notice to them, to cause their houses to fall and crush those residing in them, and that without making them any compensation.

This seems to me, though, it is true, on a somewhat extreme view of the effect of the alleged custom, to be an approval of the authority. LORD WENSLEYDALE said nothing about the suggested grant by the lord to his tenants, but his opinion contained this passage which I will cite because it seems to me to place the matter on the proper footing [pp. 704, 705]:

> There is no doubt whatever but that the lord, being the owner of the soil originally, could have given by express grant such a power, and even a much larger power, to his tenants; but then when there is no express grant, but one which is sought to be implied by usage, as a custom is, it is a condition required by law, that the custom should not be unreasonable; otherwise the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by its exercise, rather than to a grant.

Again, LORD CHELMSFORD, like LORD CRANWORTH, was apparently attracted to the idea of considering whether [p. 707]:

> . . . assuming that copyholds sprang from tenure in pure villenage, it was at all unreasonable to suppose that the lord, in consideration of the performance by the tenant of the villein services connected with his tenure, might give the tenant the right to take away for his own benefit a portion of the lord's soil within the tenement.

To the argument that the custom claimed went to the entire destruction of the copyhold tenement he replied by saying that a portion of the soil might be exhausted, but the tenement would remain. However, he cited with approval *Broadbent* v. *Wilks* (3), on the ground that it would be unreasonable to presume a reservation so entirely inconsistent with the grant of the tenements as to involve the destruction of the whole profits of the land.

My Lords, since 1861 a good deal has been discovered, by the researches of some very able legal historians, in relation to the status and nature of villeins and villeinage, and in relation to the origin of the legal interest or estate called copyhold, and I do not think that we are called upon to accept the historical views of noble Lords in that year. However, leaving those matters on one side, I think that there are some important conclusions to be drawn from *Salisbury* (*Marquis*) v. *Gladstone* (9). The first for the present purpose is that *Broadbent* v. *Wilks* (3) was approved, and that the principle that a custom would be bad if unreasonable was fully accepted. Next, *Hilton* v. *Granville* (*Lord*) (2) was accepted as good law by LORD CRANWORTH, and was not commented upon adversely by the other Lords. Further, I think that the House took the view that such a custom ought to be deemed to be unreasonable if the right claimed by the lord would or might involve the destruction of the whole profits of the copyholder. LORD CHELMSFORD stated this as being the conclusion in *Broadbent* v. *Wilks* (3). LORD CRANWORTH stated it as the ground of the decisions which he accepted, and he accordingly distinguished the customs there alleged from the alleged custom in favour of the lord set up in the case before the House. LORD CRANWORTH and LORD CHELMSFORD both decided that the custom was not unreasonable. LORD WENSLEYDALE doubted, but his opinion, I think, was clearly in favour of the view that a custom which might cause substantial injury to either the lord or the tenants was generally to be held unreasonable.

It is asserted, however, that the authority of *Hilton's* case (2) was impugned by LORD HATHERLEY, L.C., in *Buccleuch* (*Duke*) v. *Wakefield* (11), at p. 399. The trial judge, MALINS, V.-C., had approved, or at least had followed, *Hilton's* case (2). In this House, LORD HATHERLEY, L.C., after mentioning the fact, went on to say, at p. 399 :

> Whether the authority of that case would now be fully recognised or not, I do not stop to inquire.

He then pointed out that the *dictum* in that case as to the effect of a grant with a reservation of a right to let down the surface had been overruled. He said nothing more about the case, probably because the general ground of the custom being bad because unreasonable was irrelevant to the question of the true construction of the special Inclosure Act which was being considered, since that Act empowered the lord to work the mines with the widest powers imaginable, on the terms of making reasonable compensation for damage done. LORD CHELMSFORD also referred to *Hilton's* case (2), and observed in passing, at p. 410, that, if that case was an authority that " where there is nothing to shew for the right but a customary exercise of it, the custom cannot be supported," it was open to question whether the decision was correct. However, the weight of this doubt is greatly affected, I think, by the curious circumstance that he said that the custom alleged was for a mine-owner to work his mines, letting down the surface, but paying compensation to the persons injured by the mining operations. This was a serious error, for compensation might well make all the difference. On careful consideration, I must come to the conclusion that this case leaves the authority of *Hilton's* case (2) where it was. The reservation by a judge or by a Lord of Appeal of the right to reconsider a decision at some later date ought not to be taken as a statement that he thinks that the decision was erroneous.

The last case to which I shall refer on this question is *Bell* v. *Love* (12) in the Court of Appeal, where BAGGALLAY, L.J., after dealing at some length with *Hilton's* case (2) and the subsequent references to it, came to the conclusion that it had never been overruled and that it had been rightly decided. LORD COLERIDGE, C.J., agreed with his conclusion and the substance of his judgment. LINDLEY, L.J., did not mention *Hilton's* case (2), nor was it referred to in the House of Lords, where, however, the views of BAGGALLAY, L.J., were approved in several particulars and the decision was affirmed.

My Lords, I think that some indirect support for the decision in *Hilton's* case (2) is also to be derived from the subsequent decisions of this House in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (13) and in *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.* (14). In the *Butterknowle Colliery* case (13), LORD MACNAGHTEN, in a passage which has often been cited, laid down in the most emphatic terms, at p. 313, the difficulty in most cases of finding in an Inclosure Act or in a grant or a reservation language which will justify the letting down of the surface. In the same case, LORD DAVEY observed, at p. 315, that, if there was no provision for giving compensation for the injury done to the surface, it was almost conclusive that the common law rule was intended to apply. The language used in these two cases certainly points in favour of the view that such a custom as is here in question would have been regarded by the noble Lords who took part in those decisions as being unreasonable.

My Lords, we now come to the present appeal. Nearly a century after the decision in *Hilton* v. *Granville* (*Lord*) (2), the validity of the same copyhold custom in the same manor of Newcastle-under-Lyme is again being raised. The respondents are plaintiffs in the action and the appellants (who are defendants) are lessees from the Crown, in right of the Duchy of Lancaster, and the Attorney-General of the Duchy. The respondents are owners in fee simple in possession of premises at Wolstanton upon which they have erected the Wolstanton fire station. These hereditaments were formerly of copyhold tenure held of the manor. They were enfranchised under the Law of Property Act, 1922, which, however, does not affect the present question. The mines and minerals under and near the respondents' premises at all material times have been, and are, part of the property of the Duchy. The appellants have for some years past been mining, and carrying away the minerals, in the vicinity of the respondents' fire station, and the latter alleged that the workings had caused subsidence of the surface and damage to the land and buildings. On Mar. 14, 1938, they issued a writ claiming a declaration and an injunction. The appellants by their defences set up the custom to work the mines and minerals within the manor in the following terms :

> His Majesty and his predecessor in title have at all material times been seised in demesne as of fee in right of the Duchy of Lancaster of and in the manor of Newcastle-under-Lyme and of and in the mines and minerals situate within the said manor. His Majesty has and his predecessors in title at all times had as owners in right of the Duchy of Lancaster of the said manor and of the said mines and minerals and his and their assigns tenants and licencees have had the right to work and get the said mines and minerals and for that purpose to make and execute all necessary and proper diggings and excavations and other works whether on the surface of or under any lands parcel of the said manor doing no more than necessary for the purpose aforesaid and making or and paying to the respective tenants and occupiers of the surface of any lands damaged thereby a reasonable compensation and satisfaction when demanded for and in respect of the user of the surface of such lands in and about the working or getting of the said mines and minerals and for and in respect of any damage from time to time occasion to the surface of the said lands by anything done thereon in and about the working and getting of the said mines and minerals but without making compensation or satisfaction for

or in respect of the said surface on any other account and without making any compensation or satisfaction for any damage occasioned to any messuages dwelling-houses or other buildings that might be erected on lands copyhold or formerly copyhold of the said manor :

(*a*) By reason of a custom existing in the said manor from time immemorial that the owner or owners for the time being of the said manor and of the said mines and minerals and his or their assigns tenants and licencees should so work the said A mines and minerals.

(*b*) By reason of His Majesty and his predecessors in title owners as aforesaid of the said manor and of the said mines and minerals and his and their assigns tenants and licencees having as of right from time immemorial so worked the said mines and minerals.

(*c*) By reason of His Majesty and his predecessors in title as owners as aforesaid of the said manor and the said mines and minerals and his and their assigns tenants and licencees having as of right and without interruption for 60 or 30 or alter-B natively for 40 or 20 years last before the commencement of the action so worked the said mines and minerals.

They also relied on the presumption of a lost grant. It will be noted that the custom as pleaded is not confined to coal mines. The respondents by their reply pleaded that, in any event, as a matter of law, no C such custom or prescriptive or other right as alleged by the appellants could be sustained or ought to be presumed, as the same would be unreasonable.

On an application by the respondents, BENNETT, J., made an order that the point of law raised by the reply of the plaintiffs—namely, that D in any event no such custom or prescriptive or other right as is alleged in the defences could or can be sustained, or ought to be presumed, as the same would be unreasonable—be set down for hearing and disposed of before the trial of the action, pursuant to R.S.C., Ord. 25, r. 2. The point of law was argued on May 24, 1929, before FARWELL, J., who E stated that he was bound by the decision of the Queen's Bench in *Hilton* v. *Granville* (*Lord*) (2), and accordingly held that the alleged custom was bad in law. It is admitted that, if this be correct, the claim by prescription must also fail. The appellants appealed, and on July 4, 1939, the Court of Appeal (CLAUSON, LUXMOORE and GODDARD, L.JJ.) affirmed F the decision of FARWELL, J. The court relied on the decision in *Hilton* v. *Granville* (*Lord*) (2), observing that the decision had stood unchallenged for three generations, and must have affected persons residing in the manor. In those circumstances, they thought that it was the duty of the court to hold fast to that which had so long ago been decided to be G the local law.

My Lords, it has long been beyond dispute that to give validity to a custom it must possess three characteristics. It must be certain, reasonable in itself, and of immemorial origin. As regards the last, it means that the custom must have been in existence from H a time preceding the memory of man, which has been fixed as meaning 1189, the first year of the reign of Richard I : see, for the explanation of this date, the opinion of LORD BLACKBURN in *Dalton* v. *Angus* (15). The courts, however, have decided that, in the case of an alleged custom, it is sufficient to prove facts from which it may be presumed that the custom existed at that remote date, and that this presumption should in general be raised by evidence showing continuous user as of right going as far back as living testimony can go. The presumption is rebuttable, and, for instance, can be rebutted by proof that the custom alleged could not have existed in the time of Richard I. The presumption itself in most cases is little more than a fiction. It was applicable in the case of common law prescriptions (see *Dalton* v. *Angus* (15) at p. 811, and the judgment of COCKBURN, C.J., in the Queen's Bench Division, at p. 105), and in most cases no one supposed that the enjoyment really went back to 1189. In the present case, however, I think that we are called upon to assume, in determining the point of law, that the custom is being attacked only on the point that it is unreasonable, and we must, therefore, assume that in other respects it either has been, or can be, proved to be valid. We are, therefore, not directly concerned with the historical question whether any copyholds were, or could have been, in existence as early as the reign of Richard I, or whether any mines or minerals were worked in the manor at that early date by underground workings, or, indeed, whether any minerals thereunder were then known to exist. The cases I have cited show that it is incorrect to suppose that we must assume that in or previously to 1189 the lord granted the copyholds to his tenants with a reservation of his rights in the terms of the alleged custom. Prescription in the common law, which in many respects resembled a custom, was based upon the presumption of a grant which has been lost by process of time: *Rowles* v. *Mason* (16) and *Lockwood* v. *Wood* (17). It is plainly not so in the case of all customs, as the old customs of gavelkind, of borough English, of having land devisable, and various other customs sufficiently show. Some old statements to the contrary are erroneous: *Gateward's Case* (18) and *Tyson* v. *Smith* (19), at p. 421. Indeed, the opinions in this House in *Salisbury* (*Marquis*) v. *Gladstone* (9) proceed on the basis that it is not correct in the case of a custom to suppose that there has been a grant. Nor is it necessary for those who allege a custom to show how it arose or might have arisen. The presumption of immemorial origin has been treated as covering a number of difficulties. The very numerous cases in which a copyhold custom has been established will not be disturbed by proof of the fact that copyholds in fact did not exist in the manors concerned in 1189. Another remarkable instance is afforded by the cases where it has been held that a custom to entail copyholds has been proved. It is a result not well-founded in logic, since there could scarcely have been such a possibility before the statute *De Donis*, passed in 1285, long after the beginning of the reign of Richard I: see CHALLIS ON REAL PROPERTY, 3rd Edn., pp. 27, 200.

My Lords, we are left with the question whether the alleged custom presumed to have originated in or prior to 1189 has been shown to have been a reasonable one with sufficient clearness to justify this House in overruling the decision in *Hilton's* case (2) over 90 years ago. I find it very difficult, if not impossible, to hold that a custom for the lord to get minerals beneath the surface of copyhold or customary freehold lands without making compensation for subsidence and damage to buildings is a reasonable custom while accepting the view that a custom for the lord and his tenants of collieries to lay the rubbish in heaps on the copyhold lands near the pits (as in *Broadbent* v. *Wilks* (3)) is unreasonable. In either case, the lands of a copyholder might be made practically useless, although they would still be liable, to quote from Lord Cranworth in *Salisbury* (*Marquis*) v. *Gladstone* (9), at p. 702, "to pay their rents and perform their stipulated services to the lord." Yet the authority of *Broadbent* v. *Wilks* (3) is acknowledged in that case. In my view, if the one custom is held bad as being of a very oppressive character, and more probably founded in wrong and usurpation than in the voluntary consent of the copyholders of the manor, the same view ought to be taken of the other. That, at any rate, is the opinion I am disposed to adopt as to the custom for which the appellants are contending on the present appeal. However, whether or not that be a correct view, I am confident that no sufficient ground has been shown for disturbing the decision in *Hilton* v. *Granville* (*Lord*) (2) in relation to this particular manor, which has stood as the decision of a court of high authority for so many years. For these reasons, my Lords, I agree with the judgment of the Court of Appeal, and I am of opinion that this appeal should be dismissed with costs.

Lord Atkin: My Lords, I agree with the opinion which has just been delivered by my noble and learned friend Viscount Maugham, and I concur in the result which he suggests.

Lord Wright: My Lords, I also concur.

Lord Romer: My Lords, I concur also.

Lord Porter: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Hancock & Willis*, agents for *Ellis & Ellis*, Burslem (for the first appellants); *The Solicitor, Duchy of Lancaster* (for the second appellant); *Sharpe, Pritchard & Co.*, agents for *Joseph Griffith*, Town Clerk, Newcastle-under-Lyme (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

CANADIAN TRANSPORT CO., LTD. *v.* COURT LINE, LTD.

[House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **April 4, May 30, 1940.**]

Shipping—Charterparty—Construction—Loading—Subject to supervision of captain—Shipowners to give benefit of insurance "as far as club rules allow"—Rule giving insurers rights against third parties and rule restraining assignment.

By a time charter, the charterers agreed to load a cargo at their own expense, subject to the supervision of the captain. The charterparty contained a provision that, in the event of damage to the cargo, the shipowners would give the charterers the benefit of their insurance, as far as the rules of the insurers allowed. Damage was caused to a cargo of grain through the stowage of a quantity of unseasoned timber on top of it. The shipowners paid a sum of £101 in respect of that damage to the holders of the bills of lading, and in the present proceedings they claimed that sum from the charterers. The charterers resisted this claim, on the ground that they were not liable, as the shipowners were bound to give them the benefit of their insurance. Against this, it was contended that the rules of the insurers did not allow this, as those rules provided that the insurers could recover from third parties any damages due to "such neglect," and that no assignment of the cover to charterers or any other person should be deemed to bind the insurers :—

Held : (i) the words "under the supervision of the captain" did not relieve the charterers of their primary duty to stow safely, and did not, therefore, shift to the shipowners the liability for improper stowage.

(ii) the effect of the charterparty, but for the words "as far as club rules allow," would be an assignment to the charterers by the shipowners of their cover, contrary to the rules, which, when read as a whole, had the effect of preserving the rights of club members against third parties.

Order of Court of Appeal ([1939] 2 All E.R. 761) *affirmed.*

[EDITORIAL NOTE. In a dissenting judgment in the Court of Appeal, Goddard, L.J., construed the contracts in this case in accordance with the rule that, *prima facie,* a provision in an insurance contract does not prevent the insured making any contract he pleases with third parties. The rules certainly present a very difficult problem, but the House of Lords, after a full consideration of the meaning of these two relevant club rules, have reached a conclusion which is in substantial agreement with that of the majority of the Court of Appeal. They have construed the words "give the benefit of insurance" as synonomous with "assigning to cover," and have held that this is something which the club rules do not permit. On the question of stowage of cargo "under the supervision of the captain," they are unanimously of the opinion that this cannot relieve the charterers from their primary liability to stow safely.

As to Stipulations in Charterparty as to Loading, see HALSBURY, Hailsham Edn., Vol. 30, pp. 336, 337, para. 517 ; and for Cases, see DIGEST, Vol. 41, p. 348, Nos. 1975-1977.]

Cases referred to :

(1) *Brys & Gylsen, Ltd.* v. *Drysdale (J. & J.) & Co.* (1920), 4 Lloyd L.R. 24.

(2) *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co., Griffiths Lewis Steam Navigation Co.* v. *Paterson, Zochonis & Co.,* [1924] A.C. 522 ; 41 Digest 478, *3118* ; 93 L.J.K.B. 625 ; 131 L.T. 449 ; *revsg.,* [1923] 1 K.B. 420.

(3) *West of England Fire Insurance Co.* v. *Isaacs,* [1897] 1 Q.B. 226 ; 29 Digest 306, *2534* ; 66 L.J.Q.B. 36 ; 75 L.T. 564.

(4) *The Catharine Chalmers* (1874), 32 L.T. 847; 41 Digest 417, *2602.*
(5) *Sack* v. *Ford* (1862), 13 C.B.N.S. 90; 41 Digest 470, *3015*; 32 L.J.C.P. 12.
(6) *Harris* v. *Best, Ryley & Co.* (1892), 68 L.T. 76; 41 Digest 564, *3886.*

APPEAL by the charterers from an order of the Court of Appeal (SCOTT, CLAUSON and GODDARD, L.JJ.), dated May 3, 1939, and reported
A [1939] 2 All E.R. 761, reversing an order of LEWIS, J., dated Nov. 9, 1938. The facts are fully set out in the opinions of their Lordships.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the appellants.

G. St. C. Pilcher, K.C., and *G. N. W. Boyes* (for *H. L. Holman* on war service) for the respondents.

B

VISCOUNT MAUGHAM: My Lords, I have had the advantage of reading the opinion of my noble and learned friend LORD ATKIN on this appeal. As regards the first point—namely, that, since the duty of the charterers to stow was expressed to be "under the supervision of the
C captain," the responsibility for stowage was thrown upon the shipowners—I have had no doubt, nor, I believe, have any of your Lordships. The contention is clearly an ill-founded one, for the reasons given by my noble and learned friend LORD ATKIN.

As regards the second point, which arises on the true construction of
D that part of cl. 8 of the charterparty which provides that the owners are to give to the charterers the benefit of their protection and indemnity club insurances "as far as club rules allow," taken in conjunction with the club rules, I must confess that I have felt considerable doubt. The club rules, particularly r. 2 and r. 17, seem to me to present almost
E insoluble problems of interpretation, and a judicial mind must recoil from applying to the construction of written documents the principle of mere conjecture. On the whole, I think that the solution adopted by my noble friend LORD ATKIN is the best solution of which the case admits, and I concur with what he has said on the point. I therefore
F agree with the order of the Court of Appeal, and am of opinion that this appeal should be dismissed.

LORD ATKIN: My Lords, this appeal arises on a special case stated by the sole arbitrator on a claim by the respondents, the owners of the
G s.s. Ovington Court, against the appellants, the charterers of the ship on time charter, for damages for improper stowage. The charterparty is dated Jan. 28, 1937, and, though it is in time charter form, it is for the hire of the ship for a voyage from Rotterdam to the North Pacific and return to the United Kingdom or Europe. The ship apparently
H proceeded to Vancouver, and there loaded a cargo in respect of which the present claim arises. The special case is particularly niggardly of facts. It does not state from what port the ship sailed or at what port she arrived. It does not state the nature of the cargo, except that some was wheat in bulk, or how the damage arose. It does not annex the bills of lading upon which the owners' original liability arose. None of

these particulars is in fact essential for determination of the case, but it is unusual to have to decide a commercial case such as this without being able to satisfy one's ingrained curiosity about them, and the arbitrator may be congratulated upon having achieved a degree of abstraction which is certainly rare and perhaps admirable.

By cl. 8 of the charterparty : A

> . . . charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally clerks' receipts.

By cl. 24, the charter was expressly made subject to the terms of the
Carriage of Goods by Sea Act (United States), 1936, and the Water B
Carriage of Goods Act (Canada), 1936. On the ship's arrival at the port of discharge, wherever it was, a claim was made by holders of bills of lading of wheat in bulk against the shipowners for damage to the goods. The damage was due to improper stowage. The case finds that the
owners were liable to pay to the receivers under the bills of lading C
£101 3*s.* 4*d.* We are not told why, but, if, as we were informed, the ship loaded at Vancouver, presumably the liability arose under art. III (2) of the rules under the Water Carriage of Goods Act (Canada), 1936, which correspond to those in the English Carriage of Goods by Sea Act,
1924. The shipowners claimed to recover this sum which had been paid D
to the bill of lading holders from the charterers on the ground that they were liable to the owners for improper stowage under the provisions of cl. 8. The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to
be to stow, and so on, "under the supervision of the captain." This, E
it was said, threw the actual responsibility for stowage on the captain, or at any rate threw upon the owners the onus of showing that the damage was not due to an omission by the master to exercise due supervision. This, we were told, was the point of commercial importance
upon which the opinion of this House was desired. My Lords, it appears F
to me plain that there is no foundation at all for this defence, and on this point all the judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course. He has in any event to protect his ship from being made unseaworthy, and in other
respects, no doubt, he has the right to interfere if he considers that the G
proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage, no doubt they might escape liability,
but the reservation of the right of the captain to supervise, a right which, H
in my opinion, would have existed even if not expressly reserved has no effect whatever in relieving the charterers of their primary duty to stow safely, any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract. This view of

the clause is supported by the decision of GREER, J., in *Brys & Gylsen, Ltd.* v. *Drysdale* (*J. & J.*) *& Co* (1). It is true that the judge does not refer to the words "under the supervision of the master" which were in the relevant clause, but this seems to me all the more significant. It is obvious that that very experienced judge attached no importance
A to the words as affecting the liability of the charterers arising from their contract:

> . . . to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master.

The charterers were held liable for dead freight due to faulty stowage
B by the stevedore. This defence fails.

The second defence also arises under cl. 8 of the charterparty:

> Owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules, which owners would
> C have otherwise borne.

The shipowners were members of the West of England Steamship Owners' Protection and Indemnity Association, the rules of which are annexed to the case. Under r. 2, the members are protected and indemnified in respect of losses or claims which they are liable to pay in
D respect of claims arising in respect of the shipment, carriage, discharge or delivery of goods arising through other causes than improper navigation. The association, therefore, accepted the liability in respect of the bill of lading owners' claim, paid them direct the amount of this claim, and are putting forward the present claim in the name of their member
E by virtue of their right of subrogation. The charterers in effect say to the shipowners: "You have promised to give us the benefit of your insurance. You have either received or are entitled to receive the £101 due to the bill of lading holders from your insurers, or they have paid the bill of lading holders direct. In any case, we don't
F get the benefit of your insurance if we have to pay you, and, if, indeed, we were to pay you, you would have to hand over to us the amount you received from your insurers, or were entitled to receive from them." I myself have had much difficulty in appreciating what the clause really means. It cannot mean that the owners are to hold the charterers
G covered against the same risks as those against which the association hold the owners covered. It cannot extend to losses which the owners incur but not the charterers, or to losses which the charterers incur but not the owners, but I suppose that it may refer to losses which the owners incur by reason of a default by the charterers, as in the present case.
H In such a case, however, it is obvious that the owners are destroying any right of subrogation which the insurers would have against the charterers. It will be observed that this is not the case of the owners contracting with the charterers that the latter are not to be liable to them in respect of negligence or breach of contract. Insurers have to put up with exception clauses, though their risks are no doubt increased

thereby. This clause, however, leaves original liability untouched. For example, it would have no effect when the owner happened not to be insured in a club, or where the rules of the club did not allow the benefit of the insurance to be given by the member. I suppose, though I do not think it necessary to decide, that a man may contract with another on the terms that, if he is injured by that other, then, if he A happens to be insured, he will look to his insurers in relief of the wrongdoer. I am satisfied, however, that such a contract is very unusual, and, I suppose, would make it very difficult for the man to renew his insurance, and the last class of insurers to permit such a contract would, I should assume, be any form of mutual insurance society, such as a B club. The clause is applicable only so far as the club rules allow. There are two rules relied upon by the respondents as indicating that the giving of the benefit suggested by cl. 8 of the charter is not allowed by the club. The first is r. 2 (i), the first words of which, granting the indemnity to the owners, I have read. It continues : C

> . . . the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents the association shall be. entitled to take credit for any profit accruing to the members by reason of any wrongful act of his servants or agents up to the measure of its loss, or recover for its own account from third parties any damages that may be provable by reason of such neglect. D

This is quite unintelligible on the strict reading of the words. What is meant by such neglect ? " Neglect " has not been used before. The only preceding reference to negligence is to the negligence of the members' servants or agents, which could not cause provable damages against third parties. Endeavouring to give some meaning to the clause, I E think that the true construction must be damages provable against third parties by reason of their wrongful act or their negligence. If this be so, then the rule seems to me to be inconsistent with permission to the members to give the third party the protection of the insurance in defeasance of this right. F

The second rule upon which the respondents rely is r. 17 :

> No assignment or subrogation by a member of his cover with this association to charterers or any other person shall be deemed to bind this association to any extent whatsoever.

The reference to " subrogation " is obscure, and, so far as I can see, G unmeaning, but " assignment " appears to me to cover that which is intended by cl. 8 of the charter. There would seem to be no difference between agreeing to " give the benefit of insurance " and " assigning the cover." I have already discussed the difficulty of giving a real content to the relevant words of cl. 8, but, if and when they apply, it H would seem to follow that, after loss, the charterers would be entitled to claim by way of equitable assignment the sum due by the club to the owners, or received by the owners from the club. In any case, cl. 8 seems to express an assignment by the owners to the charterers of their cover with the club—" give them the benefit of their insurances "—

and such assignment does bind the club "to any extent whatsoever," for, if it operates at all, it would appear effectively to deprive the club of its right of subrogation. For these reasons, which are substantially those of SCOTT and CLAUSON, L.JJ., I think that this defence also fails. I agree with the order made by the Court of Appeal, and am of opinion A that this appeal should be dismissed with costs.

LORD WRIGHT: My Lords, the arbitration out of which this appeal arises was between the respondents, as owners of the Ovington Court, and the appellants, as charterers under a charterparty dated Jan. 21, B 1937, whereby the owners agreed to let, and the charterers agreed to hire, the steamship on a voyage from Rotterdam, where she was to be placed at the charterers' disposal, to the North Pacific and return to United Kingdom or Europe, *via* any port or ports at charterers' option, at a rate of hire of 5*s.* per day per ton on her dead weight. The steam- C ship was to be employed in the carriage of lawful merchandise and in lawful trades between the specified limits. Of the various clauses in the charter, cl. 8 is the only one which I need particularise. It is as follows:

> The captain shall prosecute her voyages with the utmost despatch and shall D render all customary assistance with the ship's crew and boats. The captain (although appointed by the owners), shall be under the orders and direction of the charterers as regards employment or agency; and charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally clerks' receipts. Owners to give time charterers the benefit of their protection and indemnity club insurances

E Then follow words here printed in italics, which were substituted for certain words struck out:

> *as far as club rules allow,* and in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules, which owners would have otherwise borne.

F The issue turns on this clause read in connection with the rules of the West of England Steamship Owners' Protection and Indemnity Association, of which the respondents were members.

The award is very bare in stating the facts. No doubt the arbitrator stated all the facts placed before him. He stated that under the charter- G party the respondents became liable to pay £101 3*s.* 4*d.* to receivers under bills of lading dated Mar. 18, 1937, covering wheat in bulk, for damages for failure to deliver those goods in the same good order and condition as when shipped. The damage to the goods was due to improper stowage. The sum of £101 3*s.* 4*d.* was paid in full by the associa- H tion to the receivers, the respondents remaining liable to refund £10 in respect thereof to the association. This £10 is the franchise, which, according to the club rules, the owners had to bear in respect of the loss. The arbitrator does not exhibit the bills of lading, but it is obviously assumed that the owners were liable under them to the receivers for improper stowage. Indeed, that must have been so if they were issued on the North Pacific coast, and were, as they must have been, subject either to the Carriage of Goods by Sea Act (United States), 1936, or to the Water Carriage of Goods Act (Canada), 1936. The award stated that no evidence was adduced by either party as to the loading, save that it was admitted that the damage was due to improper stowage. There was no evidence, it added, of the extent, if any, to which there was supervision by the captain, nor was there any evidence of protest or approval by him in respect of the stowage. The arbitrator made his award in the form of a special case for the decision of the court—namely, whether, on the facts found, and on the true construction of the contract, the respondents were entitled to recover £101 3*s*. 4*d*. or £10 or nothing. He awarded, subject to the opinion of the court, that they should recover £10, and, in the alternative, awarded that they should recover £101 3*s*. 4*d*. or nothing. His award was upheld by Lewis, J., but the Court of Appeal by a majority upheld the alternative award of £101 3*s*. 4*d*.

There are two quite separate questions. The first is whether the appellants, as charterers, are liable to indemnify the respondents in respect of their liability under the bills of lading for improper stowage. Both courts below have answered that question in favour of the respondents. The other question is whether that obligation is, under cl. 8 of the charterparty and the club rules, reduced to £10, as the arbitrator, Lewis, J., and Goddard, L.J., dissenting in the Court of Appeal, thought, or whether, as the majority of the Court of Appeal thought, it was not reduced or affected at all. I agree with that latter opinion.

Apart from special provisions or circumstances, it is part of the ship's duty to stow the goods properly, not only in the interests of the seaworthiness of the vessel, but also in order to avoid damage to the goods, and to avoid loss of space or dead freight owing to bad stowage. In modern times, the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are, under the charterparty, to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect. Under cl. 8 of this charterparty, however, the charterers are to load, stow and trim the cargo at their expense. I think that these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but, as between themselves and the shipowners, relieve them of liability for bad stowage, except as qualified by the words "under the supervision of the captain," which I shall discuss later. The charterers are granted by the shipowners the right of performing a duty which properly attaches to the shipowners. Presumably this is for the convenience of the charterers. If the latter do not perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading

holders. Justice requires that the charterers should indemnify the ship-
owners against that liability, on the same principle that a similar right
of indemnity arises when one person does an act, and thereby incurs
liability, at the request of another, who is then held liable to indemnify.
That such a liability on the part of the charterers is contemplated is
A shown by the last words of cl. 8, which suppose that the charterers
may incur liability for " damage to cargo."

So far, I think, is clear. What, then, is the effect of the words " under
the supervision of the master " ? These words expressly give the master
a right which I think he must in any case have—namely, a right to
B supervise the operations of the charterers in loading and stowing. The
master is responsible for the seaworthiness of the ship, and also for
ensuring that the cargo will not be so loaded as to be subject to damage,
by absence of dunnage and separation, by being placed near to other
goods or to parts of the ship which are liable to cause damage, or in other
C ways. A striking instance of bad stowage of this character is *Elder,
Dempster & Co.* v. *Paterson, Zochonis & Co.* (2). However, I think this
right is expressly stipulated, not only for the sake of accuracy, but
specifically, as a limitation of the charterers' rights to control the stowage.
It follows that, to the extent that the master exercises supervision, and
D limits the charterers' control of the stowage, the charterers' liability
will be limited in a corresponding degree. The arbitrator was evidently
of this opinion. He expressly found that there was no evidence of the
extent, if any, to which there was supervision by the captain, or of
protest or approval by him in respect of the stowage. He obviously
E held, and, as I think, rightly held, that there was in this case no ground
for imposing any limitation on the charterers' liability to the shipowners
in respect of the improper stowage.

The matter is one of some importance in mercantile affairs, because
a clause of this type is not uncommon. The amount involved here is
F small, but the liability in other cases may be very considerable. A
vessel may be totally lost owing to improper stowage, or very severe
damage may be done to cargo. However, there does not appear to be
any express decision on the point, though in *Brys & Gylsen, Ltd.* v.
Drysdale (J. & J.) & Co. (1) GREER, J., seems to have been of the same
G opinion as that which I have expressed. The master's power of super-
vision is obviously not limited to matters affecting seaworthiness.

The arbitrator did not award to the respondents the full amount which
they claimed, but awarded them only £10, obviously because he thought
that the appellants were entitled under cl. 8 to the benefit of the
H respondents' club insurances, and hence could claim only £10, the
franchise which they had to bear. In my opinion, he was not right in
that view. The relevant words of cl. 8 of the charter can mean only
that the respondents agree to give the appellants the same rights as they
have against the club, which is in substance the right, subject to the
franchise, to be paid the amount of the loss. However, this would nullify

the right which the club has, on payment to its member, to make a claim in the name of the member against the appellants, as being the persons whose default has caused the loss. It is obvious, and, indeed, was admitted at the bar, that it is just this claim which is being brought in the present arbitration. The appellants' contention, if right, would thus defeat the club's right of subrogation. If that were effectively done by the respondents without the consent of the club, the respondents would be liable for, and the club would be entitled to recover, the value of the right of subrogation from the respondents: *West of England Fire Insurance Co.* v. *Isaacs* (3), at p. 236. It is not very probable as a matter of business that the respondents would enter into such a bargain with the appellants, and it is just as improbable that the club would sanction it. Though such a bargain would affect the right of subrogation, I do not see how it has any other effect. In the facts of this case, the respondents have had to pay the bill of lading holders, they have been indemnified by the club, and the club, according to the appellants' claim, is now to be deprived of its legal right to claim over against the persons who have caused the damage. This position is entirely different from the position when the remedies against the person in default are limited by the provisions or exceptions in the contract under which the liability arises. There is in cl. 8 no exceptive limitation on the appellants' liability to the respondents. Whatever may be the effect of the particular words in question of cl. 8, it is subsequent to the liability of the shipowner to the bill of lading holders. Clause 8 can only come into operation when the liability has been incurred. It cannot affect the amount of that liability. It is not, either in form or substance, a promise that there shall be no liability on the appellants to indemnify the respondents. If that were the effect, the appellants would not need the protection of the respondents' insurance with the club. I am unable to agree with what I understand to have been the reasons of GODDARD, L.J., in his dissenting judgment.

Without express sanction on the part of the club, I think that the appellants' claim would be inadmissible. I turn to the club rules to see if "the club rules allow" what the appellants contend for. I find, however, that the rules which are vouched as material negative the appellants' contention. So far as concerns the club, the claim against them here in question must have been based on the indemnity section of r. 2, which provides that members are:

> . . . indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay, and shall have in fact paid . . .

Rule 2 (i), headed "Indemnity," is as follows:

> For other claims arising in respect of the shipment, carriage, discharge or delivery of goods or merchandise, arising through other causes than "improper navigation" [which comes under the head of Protection] the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents the association shall be entitled to take credit for any profit accruing

> to the member by reason of any wrongful act of his servants or agents, up to the measure of its loss, or recover for its own account from third parties any damages that may be provable by reason of such neglect.

But for the obscurity of the words "such neglect," it would be clear that the club was stipulating as against its member to have the right to recover on its own account, so far as was necessary to recoup itself for its A liability to its member, the damages which the member would be entitled to recover from the person in default. In other words, the latter part of the clause confirms expressly to the club a right corresponding in substance to the ordinary right of subrogation. If the words had been, not "such neglect," but "the neglect of the third parties or their B servants or agents," no question could have arisen. It is certainly difficult to construe that "such neglect" with literal or technical accuracy, but I think that it can be fairly construed as referring back to the earlier words "negligence or default of their servants or agents." "Such neglect," on that view, reiterates the same idea in application to C third parties, to whom alone the latter words relate. This gives a reasonable and intelligible meaning to the words, which otherwise are simply unintelligible. On this interpretation, which I think is right, r. 1 (i) is expressly inconsistent with the appellants' claim. The rule, so far from allowing, definitely disallows what the appellants contend for.

D I think, then, that r. 2 (i) excludes such a claim as that of the appellants. If, however, the appellants assert that that for which they are contending is to be entitled to claim as assignees of the right to be indemnified which the respondents as members have, or had, against the club, the claim would obviously be most anomalous in many ways, E but it is enough here to say that, in my opinion, r. 17 would conclusively dispose of it. It provides as follows:

> No assignment or subrogation by a member of his cover with the association to charterers or any other person shall be deemed to bind this association to any extent whatsoever.

F I shall ignore the word "subrogation," to which I have failed to give any intelligible meaning. I think that it is probably no more than an amplification, technically inaccurate, of the word "assignment." In my opinion, the way of construing cl. 8 of the charterparty most favourable to the appellants is that it amounts to an agreement in equity by the G respondents to assign to them the benefit of their insurance or cover with the club, and that the claim which has arisen against the club has become in equity assigned to the appellants. If that be the meaning (and there are many obvious considerations which make me feel that it is much too favourable to the appellants), then r. 17 clearly and expressly H nullifies any such agreement to assign. I agree in substance with the reasoning of SCOTT and CLAUSON, L.JJ. In my judgment, the appeal should be dismissed.

LORD ROMER: My Lords, I have had the privilege of reading the opinions which have just been delivered by my noble and learned friends

Lord Atkin and Lord Wright. For the reasons which they give, I also agree that this appeal should be dismissed.

Lord Porter: My Lords, this case comes to your Lordships' House on appeal from a decision of the Court of Appeal given on May 3, 1938. The dispute was originally submitted to arbitration, in which the award was stated in the form of a special case. It is upon that special case that your Lordships have to determine the rights and liabilities of the parties. The case is very shortly stated, and the facts may, I think, be set out in its wording without unduly lengthening my opinion. They are as follows:

1. By a charterparty dated Jan. 28, 1937, a copy of which is annexed hereto and forms part of this case, the claimants agreed to let and the respondents agreed to hire the s.s. Ovington Court for a voyage to the North Pacific and return to the United Kingdom or Continent.

2. The said charterparty further provides (*inter alia*) as follows . . . "8. The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency, and charterers are to load stow and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo as presented, in conformity with mates' and tally clerks' receipts. Owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo charterers to bear the franchise according to the club rules, which owners would have otherwise borne."

3. At all material times the claimants were members of the West of England Steamship Owners Protection and Indemnity Association, Ltd., and the said steamship was entered in Class 1 Protection and Indemnity. A copy of the rules of the said association is annexed hereto and forms part of this case.

4. The said rules provided as to Class 1 (*inter alia*) as follows: "2. The members are protected and indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay, and shall have in fact paid as follows:

INDEMNITY.

(i) For other claims arising in respect of the shipment, carriage, discharge, or delivery of goods or merchandise arising through other causes than "improper navigation" the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents . . .

Provided that, except in respect of claims for loss of life and personal injury the member shall bear the first £10 of any one claim attaching to either the protection or indemnity section of the rules . . . 17. No assignment or subrogation by a member of his cover with this association to charterers or any other person shall be deemed to bind this association to any extent whatsoever.

5. During the currency of the said charterparty the claimants became liable to pay the sum of £101 3*s.* 4*d.* to receivers under certain bills of lading, dated Mar. 18, 1937, and covering wheat in bulk, as damages for failure to deliver the said goods in the same good order and condition as when shipped. The damage to the said goods was due to improper stowage.

6. The said sum of £101 3*s.* 4*d.* was paid in full by the said association to the said receivers, the claimants remaining liable to refund £10 in respect thereof to the said association.

11. Save that it was admitted that the damage was due to improper stowage, no evidence was adduced by either party as to the loading. There was no evidence of the extent, if any, to which there was supervision by the captain nor was there any evidence of protest or approval by him in respect of the stowage.

In these circumstances, the shipowners claimed that the charterers were liable, under the terms of cl. 8 of the charterparty, to indemnify them in respect of the loss sustained by reason of bad stowage. The respondents maintained that, on the true construction of the clause, the liability for proper stowage was upon the ship, and not upon the charterers,

and that, in any event, the charterers were entitled to rely upon the latter part of the clause, by which the owners were to give them the benefit of their insurances. The arbitrator awarded the claimants £10 only—namely, the amount of franchise which the shipowner had to bear before he received any indemnity from his club. This award was
A affirmed by the judge to whom the award was referred. The Court of Appeal, however, reversed these decisions, and found, in the terms of one of the alternative awards, that the claimants were entitled to recover £101 3*s*. 4*d*.

Before your Lordships' House, the appellants maintained that they
B were free from any liability to the respondents. In their submission, the responsibility for loading, stowing and trimming the cargo was that of the owners, through their master, and not that of the charterers. Alternatively, they contended, as they had also contended before the arbitrator, that they were liable only for the £10 awarded by him,
C because, even if the obligation of safe stowage was imposed upon them, they were entitled to the benefit of the indemnity club insurances, and, as the shipowners had been recouped by the club for all their loss except the £10 franchise, no further loss was payable by the charterers. The shipowners, on the other hand, said that it was the charterers who
D were under an obligation to stow safely, and that the indemnity which was promised to them was available only so far as the club rules allowed. The club rules, as they alleged, did not so allow, and for this contention they relied, not only upon cl. 17, quoted in para. 4 of the special case, but also upon the rest of the wording of r. 2 (i) of the club's rules, which,
E after beginning as set out in para. 4 of the special case, continues as follows :

> . . . the association shall be entitled to take credit for any profit accruing to the member by reason of any wrongful act of his servants or agents, up to the measure of its loss, or recover for its own account from third parties any damages that may
> F be provable by reason of such neglect.

The question to be determined is obviously one which depends solely upon a true interpretation of the charterparty. The grounds upon which, and the circumstances under which liability for stowage falls upon either the shipowner or charterer, as the case may be, have
G been discussed in a number of cases, four of which involved a consideration of liability as between shipowners and charterers themselves. They are *The Catharine Chalmers* (4), *Sack* v. *Ford* (5), *Harris* v. *Best, Ryley & Co.* (6) and *Brys & Gylsen, Ltd.* v. *Drysdale* (*J. & J.*) *& Co.* (1). I do not, for myself, find much assistance from the decisions in any of
H these cases. The wording in all except *Brys & Gylsen, Ltd.* v. *Drysdale* (*J. & J.*) *& Co.* (1) is very different from that used in the present charterparty, and, though in the last-mentioned case the wording is similar to that in the present, the judge who tried the case accepted the view that the liability was imposed upon the charterers, apparently, without being asked to give any very close consideration to the matter. Speaking

for myself, however, I am in agreement with what I understand to be
not only his view in that case. but also the view of all the tribunals
which, in the present case, have had to consider the meaning of the
charterparty. In my opinion, by their contract the charterers have
undertaken to load, stow and trim the cargo, and that expression
necessarily means that they will stow with due care. *Prima facie*, such A
an obligation imposes upon them the liability for damage due to im-
proper stowage. It is true that the stowage is contracted to be effected
under the supervision of the captain, but this phrase does not, as I
think, make the captain primarily liable for the work of the charterers'
stevedores. It may be, indeed, that in certain cases, as, for example, B
where the stability of the ship is concerned, the master would be
responsible for unseaworthiness of the ship and the stevedore would
not. In such cases, however, I think that any liability which could be
established would be due to the fact that the master would be expected
to know what method of stowage would affect his ship's stability and C
what would not, whereas the stevedores would not possess any such
knowledge. It might be, also, that, if it were proved that the master
had exercised his rights of supervision, and had intervened in the stowage,
again the responsibility would be his, and not that of the charterers. The
primary duty of stowage, however, is imposed upon the charterers, D
and, if they desire to escape from this obligation, they must, I think,
obtain a finding which imposes the liability upon the captain, and not
upon them. In the present case, there is no such finding and there is
no reason for allowing them to evade the obligations which they have
undertaken. E

It will be seen that, in the view I have expressed, my opinion is formed
solely upon the terms of the contractual relations existing between
the parties by reason of cl. 8 of the charterparty. These, I think, are
sufficient to impose a liability upon the charterers, and it is not necessary
to consider the alternative view, taken by the Court of Appeal, that the F
charterers, by requesting the captain to sign the bills of lading under
which the obligation of delivering cargo in good condition was imposed
upon the ship, undertook to indemnify the shipowners against liability
so incurred. If I am right in so construing the charterparty, the
charterers are liable for sums paid by the shipowners in respect of G
damage to bill of lading holders, except to the extent to which they
are protected by the provision that owners are to give charterers the
benefit of the protection and indemnity of the club insurances as far
as club rules allow. This phraseology is somewhat obscure, and might,
I think, bear one of two meanings—namely, (i) that the owners will H
assign to the charterers their right of action against the club for losses
in respect of which the club have undertaken to indemnify them, or
(ii) that the owners, being indemnified against such loss by their pro-
tection club, would forgo their right to sue the charterers in respect
of losses so recoverable, for which the charterers would otherwise be liable.

Apart from the provision that these advantages are to be given only as far as club rules allow, I see no reason why the shipowner should not make a contract to either effect, whatever its legal result may be. Whichever view be taken of the true meaning of the clause, however, I think that the club rules forbid the shipowner giving the benefit
A suggested. In the one case, despite the obscurity of the expression "subrogation by a member of his cover with this association," the provisions of r. 17 would appear to prevent the assignment suggested. Whatever "subrogation" may mean in this collocation, the rule, in my view, forbids the assignment, whether before or after loss, of the
B member's rights against the club. However, if the meaning suggested under head (ii) above is preferred, then the giving of such benefit is prohibited by the words quoted above from r. 2 (i):

> The association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect.

C The use of the words "such neglect" gives rise to some difficulty. Strictly speaking, the only negligence mentioned in the subrule is the negligence of the member's servants or agents. Obviously, however, third parties cannot be liable for the neglect of a member's servants or agents, and I think that a reasonable construction may be put upon
D the words by reading "such neglect" as meaning the neglect of the servants or agent of the third party. If this be the true view, the subrule expressly provides for the retention of the club's right to recover against third parties who are liable for bad stowage, or for other matters causing loss to the shipowner, and forbids the shipowner from excusing
E the third party from the results of his negligence. Whichever view, therefore, be taken of the meaning of the phrase "Owners to give time charterers the benefit of the protection of their club insurances as far as club rules allow," club rules, in this case, do not allow the granting of the benefit which the owners are suggested to have given. For these
F reasons, I think that the judgment of the Court of Appeal was right, and should be affirmed.

Appeal dismissed with costs.

Solicitors: *Middleton, Lewis & Clarke* (for the appellants); *Holman, Fenwick & Willan* (for the respondents).

G [*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

MITFORD CO., LTD. *v.* COAL COMMISSION.

[CHANCERY DIVISION (Farwell, J.), **June 4, 5, 1940.**]

H *Mines—Coal mine—Lease granted to one company—Subsequent lease granted to another company—Concurrent leases—"Retained interest" within meaning of Coal Act,* 1938*—Coal Act,* 1938 (*c.* 52), *ss.* 1 (1), (2), 2 (1), (2), 3 (1), (2), (3), 5 (1), (2).

In 1890, a mining lease was granted to P. Collieries, Ltd., the lease to expire in 1945. B. Co., Ltd., having acquired the reversion expectant on the determination of that lease, granted a lease for a term of 100 years to the plaintiff company in 1938, shortly before the coming into force of the Coal Act, 1938, with the result that the earlier lease was now concurrent with the later lease. P. Collieries, Ltd., continued to work the mines comprised in the lease of 1890. Thereupon the question arose whether the lease granted to the plaintiffs in 1938 was an interest which the Coal Commission had to acquire pursuant to the Coal Act, 1938, or whether it was a " retained interest " within the meaning of that Act. On behalf of the defendants, the Coal Commission, it was contended, *inter alia,* that the lease granted in 1938 took effect " indirectly " out of the lease granted in 1890 within the meaning of the Coal Act, 1938, s. 5 (2) (*a*), and was not, therefore, a " retained interest " in accordance with the wording of that section :—

HELD : the plaintiffs' interest was a " retained interest " within the meaning of the Coal Act, 1938, s. 5 (2) (*a*).

[**EDITORIAL NOTE.** The Coal Act, 1938, sought to replace the owners of mining royalties by the Coal Commission. Such owners were usually owners of the fee simple of the land or the mining rights. It was no part of the policy of the Act to interfere with or to displace mining lessees actually working the coal. In the present case, the effect of the Act upon the position of the owner of a concurrent lease is considered. Such a person will not be immediately concerned with the working of the coal until the determination of the lease of the lessees in possession. The question is whether the concurrent lease is a retained interest within the meaning of the Act.

AS TO RETAINED INTERESTS, see HALSBURY, Hailsham Edn., Supp., Mines, para. 1170; and FOR THE COAL ACT, 1938, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 31, p. 457.]

ORIGINATING SUMMONS to determine whether a certain mining lease was a " retained interest " within the meaning of the Coal Act, 1938, s. 5. The facts are fully set out in the judgment.

C. E. Harman, K.C., and *A. G. N. Cross* for the plaintiffs.

W. P. Spens, K.C., and *Wilfrid M. Hunt* for the defendants.

FARWELL, J. : By a lease, dated May 9, 1890, and made between Sir Pyers William Mostyn of the one part and the Point of Ayr Collieries, Ltd., of the other part, Sir Pyers Mostyn granted a lease from Lady Day, 1890, to expire on Lady Day, 1945. The lease, which was a mining lease, gave to the company the right to get and mine the coal, and also included the surface, cottages and other things. The habendum is as follows :

> To have and to hold the demised minerals liberties and privileges and other premises hereby demised except as aforesaid unto the lessees their successors and assigns from Mar. 25, 1885, for the term of 60 years thence next ensuing . . .

Then the rent is provided for, and certain royalties and other payments have to be made. The lease contains covenants which are in more or less the usual form in such a lease. The Point of Ayr Collieries, Ltd., worked, and still work, the mines and minerals contained in that lease. In 1907, there was some alteration made (by a deed of Aug. 2, 1907, between the same parties) in the royalties payable. It is not necessary, I think, for me to make any further reference to that.

In 1914, the plaintiff company was incorporated, and by the memorandum of that company its objects are as follow :

> . . to purchase and acquire land, mining and other rights or property, fixed or

> movable, in the United Kingdom or any part of the British Empire, or any country dependent thereon or any foreign country.

It has power to carry on mining operations, and its capital is £5,000. The company thus came into existence, and is still, of course, an existing company.

A In 1923, the Bromborough Estates Co., Ltd., acquired the reversion expectant on the lease of 1890, and in 1932 one Hanmer leased certain mining rights to Point of Ayr Collieries, Ltd. On June 18, 1938, the Bromborough Estates Co., Ltd., granted a lease to the plaintiff company, including in that lease the property comprised in the lease of 1890. B By that lease, made between the Bromborough Estates Co., Ltd., and the plaintiff company, the Bromborough Estates Co., Ltd., granted to the plaintiff company a lease for the period which appears in the lease. By the definition clause in that lease, the mineral area is defined, and the following definitions are then given:

C

> "The demised mines" means the mines and seams of coal fireclay iron ore and ironstone demised by cl. 2 hereof and "the demised minerals" means the minerals in the demised mines.

The grant was in these terms:

> In consideration of the rents royalties covenants and agreements hereinafter D reserved and contained and on the part of the tenants to be paid observed and performed the lessors hereby grant and demise unto the tenants all those the seams of coal fireclay iron ore and ironstone as well opened as unopened lying and being upon within and under and which can or may be wrought obtained or gotten upon within under or out of any of the several parcels of land constituting the mineral area that is to say . . .

E Then the parcels are defined, and there is a reference to two maps, the surface map and the map of the mineral area. The term of the lease is as follows:

> To hold the same unto the tenants for the term of 100 years from June 24, 1938, but subject to the provisions hereinafter contained and also subject so far as the premises first and thirdly hereinbefore described as respectively affected thereby F to and with the benefit of (i) the mining lease of 1890 and the rent and royalties thereby reserved and in particular together with the benefit (so far as the lessors can assign the same) of the right conferred by the mining lease of 1890 upon the lessor thereunder and his assigns upon the expiration or sooner determination of the term thereby granted to purchase all iron on the tram or other ways and all machinery plant . . .

The effect of the lease was that it took effect while the 1890 lease was G still in existence, and was, therefore, concurrent with the 1890 lease down to 1945, when, in the ordinary way, the 1890 lease would come to an end, whereupon the plaintiff company would become the only lessees of the property comprised in the lease. The lease contained various covenants to work the mine, and other covenants of that sort, H and there is a provision that the rents which the plaintiff company would receive from the lessees under the 1890 lease were to be collected by the agent, who was the agent of the lessor, and paid over, of course, to the lessor. Therefore, the position was that, during the continuance of the lease of 1890, Point of Ayr Collieries, Ltd., continued, and do still continue, to work the mines and minerals comprised in their lease of the various properties, the lease of 1938 being concurrent with that lease, and coming into effective operation in 1945, or any earlier date at which the lease of Point of Ayr Collieries, Ltd., came to an end.

On July 11, 1938, the plaintiff company acquired the lease of another coal mine which they worked, and which they are still working. It is not, I gather, a very large mine. They employ some 14 men underground and some 5 men on the surface. The evidence is that they are still working, and have been working, those minerals ever since the grant of that lease. On July 29, 1938, the Coal Act, 1938, came into operation. In those circumstances, the question which I have to determine is whether the plaintiffs' lease of 1938 is an interest which the Coal Commission has to acquire under the Act (paying compensation for it), or whether it is excepted from the provisions of the Act which provide for the acquiring of such an interest, and is a retained interest within the meaning of the Coal Act, 1938, so that the lease continues to exist until its determination and the expiration of its term.

The question really turns wholly upon the true construction of a very short passage in one section of the Act, and I must turn to the Act now to see exactly what the effect of it is, so far as it is material to the question which I have to consider. The preamble to the Act is as follows:

> An Act to make provision for the acquisition of the property in all unworked coal and mines of coal and in certain associated minerals, and of certain associated property and rights in land, by a commission with power of management thereover; for amending the enactments relating to facilities for the working of minerals; for empowering the commission to promote a reduction in the number of coal-mining undertakings; for continuing the Coal Mines Act, 1930, Part I, and for amending the provisions thereof with respect to committees of investigation; for enabling land to be acquired compulsorily for the purposes of the miners welfare committee; and for purposes connected with the matters aforesaid.

Putting it very briefly, the Act was passed for the purpose of enabling a commission known as the Coal Commission—which by the Act is made a body corporate with perpetual succession and a common seal and with power to hold land without licence in mortmain—to acquire the rights to the land and the rights to royalties and rents, and to be the owners of royalties or of the surface or of the rights in minerals. The Act does not contemplate—in fact, it forbids—the carrying on of the getting of coal by the Coal Commission, but the Coal Commission's duties are to acquire by paying compensation the rights of the mineral owners and the royalty owners, and to make such arrangements as they think fit or desirable for letting the rights to work the mines to various people who desire to take them. The policy of the Act, however, appears to be not to disturb—in the first instance, at any rate—the lessees who hold underleases under which the minerals are actually being worked. The Act apparently intended that those leases should continue until the expiration of the leases in the ordinary way by the effluxion of time, and that in the meantime the rents and royalties payable under those leases should be paid to the commission, who should apply the money for the general benefit of the industry itself and for the benefit of the public generally. As and when the leases expire, then the commission have to grant other leases upon such terms as they think proper (subject to the provisions of the Act, of course), and, among other things, the Act does provide that the commission shall not reduce any rent during the currency of any lease, and that in granting leases the commission shall observe the rents and conditions which are customary in the district and shall impose terms which are general, having regard to the circumstances of the case. Putting it quite broadly, the commission, as and when the leases fall in, have to exercise a proper discretion, having regard to the terms of the Act, to obtain a proper rent for the minerals when they are let to persons who propose to work them.

In those circumstances, the position with regard to this particular mine was that, as soon as the Act came into operation, the Bromborough Estates Co., Ltd., who were the owners in fee simple of the minerals in question, were a company to whom compensation, calculated as provided by the Act, became payable, and, upon such compensation being paid, they ceased to have any interest in the mines in question. Their rights under the lease became vested in the Coal Commission, but the lease of 1890 to the Point of Ayr Colliery Co., Ltd., was not affected. That is to say, it continued, and will continue in the ordinary course of events, down to Lady Day, 1945, the rents and royalties reserved by that lease being payable, as things are now, through the plaintiff company to the commission. If the lease to the plaintiff company had never been granted, the position would have been the same, except that the rents and royalties would have been payable direct to the Coal Commission instead of going through the hands of another person or company, and no difficulty could have arisen in those circumstances, because, under the general provisions of the Act, that lease would have continued to exist down to Lady Day, 1945, and at the end of that period, by the terms of the lease itself, it would determine, and as from that date it would be the duty of the Coal Commission to let the mines in question on such terms as, subject to the provisions of the Act, they thought proper.

However, the position now is that, from 1938 down to 1945, by virtue of the lease of 1938, the plaintiff company has a lease concurrent with the lease of 1890, and, at the expiration of the 1890 lease—namely, on Lady Day, 1945—the only lease which will then exist in connection with these properties will be the lease of 1938, under which the plaintiff company will *prima facie* be entitled to work the mines upon the terms and conditions of that lease. That being so, the question arises whether there is anything in this Act which will enable the Coal Commission to acquire the rights of the plaintiff company under the lease of 1938 so that at the expiration of the lease of 1890—namely, on Lady Day, 1945—the Coal Commission will be in a position to make such arrangements as they think fit for letting the minerals comprised in that lease, without regard to the rights which the plaintiff company have under the lease of 1938, subject, of course, to compensation being paid to the plaintiff company. The plaintiff company say that there is nothing in the Act which can affect their position. They say that they are saved by the section of the Act to which I will refer in a moment, and by the provisions of the Act, so far as the Act gives the right to retain the rights and minerals on payment to the commission, and that their lease does continue, and will continue, and from 1945 will enable them to work the minerals until the expiration of their lease some 60 years hence, or some period of that kind—they, of course, paying the rents and royalties reserved by that lease, but paying them to the commission.

As I have said, the whole matter turns upon certain sections of the Coal Act, 1938, or, rather, I should say, the whole matter really turns upon a very few words in sect. 5 of that Act. Sect. 1, so far as material, provides as follows:

> (1) There shall be a Coal Commission (in this Act called "the commission") to exercise and perform the powers and duties set out in this Act. (2) The commission shall be a body corporate by the name of the "Coal Commission," with perpetual succession and a common seal, and with power to hold land without licence in mortmain.

Sect. 2 provides as follows:

> (1) It shall be the duty of the commission to exercise their functions as owners of the fee simple in coal and mines of coal, and of the property and rights to be acquired by them therewith, in such manner as they may think best for promoting the interests, efficiency, and better organisation of the coal-mining industry.
>
> (2) The commission shall not themselves engage in the business of coal-mining or carry on any operations for coal-mining purposes, other than searching and boring for coal, but shall grant leases for those purposes.

Thus, it is quite clear that, as I have already said, the whole policy of the Act is not to give the Coal Commission any power to carry on the business of coal mining, but to put them in the place of the owners of the fee simple and of royalties, making such arrangement as they think proper for the letting of the rights to work the mines as and when the existing leases come to an end. Sect. 3 provides as follows:

> (1) The commission shall acquire in accordance with the provisions of this part of this Act the fee simple in all coal and mines of coal, together with such property and rights annexed thereto and such rights to withdraw support as are hereinafter mentioned, subject to such servitudes, restrictive covenants and other matters adversely affecting any of the said coal or mines as are hereinafter mentioned, and subject to the provisions of this part of this Act with respect to the retention of interests arising under coal-mining leases and of certain other interests. (2) During the period between Jan. 1, 1939 (in this Act referred to as the "valuation date") and July 1, 1942 (in this Act referred to as the "vesting date") all coal and mines of coal shall be held as if all the existing owners thereof had, in respect of all their interests therein other than retained interests and with full capacity so to do, entered into a contract on the valuation date for the sale thereof to the commission, at a price to be ascertained by valuation, with provision for completion of the contract on the vesting date.

Thus, for the period between Jan. 1, 1939, and the vesting date, which is July 1, 1942, the coal owners are in the position of vendors with an unpaid purchase price, with a right to be paid the purchase price on the due date, and they carry on as trustees for the Coal Commission. Subsect. (3) provides as follows:

> On the vesting date all coal and mines of coal as existing at that date shall

vest in the commission for a title comprising all interests then subsisting in any such coal or mine other than retained interests.

The next section to which I must refer, and the section which is the material section here, is sect. 5, which deals with those interests which are not to be affected by the Act except to the extent that any rent A payable under any lease to the original owners or to the lessors is thenceforth to be payable to the Coal Commission. Sect. 5 (1) is in these terms:

> Except as provided by subsect. (2) of this section, interests in coal or a mine of coal that arise under a coal-mining lease shall be retained interests.

B I understand that to mean that those rights are to remain untouched by this Act except in so far as the Coal Commission take the place of the lessor. Then follows subsect. (2), which is divided into two parts, and is in these terms:

> The following interests . . . shall not be retained interests unless the commission so direct.

C Thus, the position is that the interests in coal or a mine of coal which arise under a coal-mining lease are retained interests, but, if something which otherwise would be a retained interest comes within subsect. (2) (*a*) or subsect. (2) (*b*), then it never does become a retained interest, and is D an interest which the Coal Commission will acquire upon the payment of compensation. It is, as it were, an exception out of what would otherwise be a retained interest. Subsect. (2) (*a*) defines certain interests as follows:

> interests arising under a coal-mining lease in coal or a mine of coal which is sub-demised by a coal-mining lease derived out of that lease, or which is, by virtue E of any other form of disposition taking effect directly or indirectly out of that lease, held in like manner as if it had been so sub-demised . . .

Subsect. (2) (*b*) is as follows:

> interests arising under a coal-mining lease where neither the lessee nor any person claiming under him is a person carrying on the business of coal-mining and having a substantial beneficial interest in the exercise of the rights conferred by F the lease . . .

The question whether or not the particular interests under para. (*b*) are within the exception of what would otherwise be a retained interest is a question of fact, to be determined on proper evidence. It is not a question of law. The evidence in this case is wholly one way—namely, G to prove that they are the lessees of a mining lease and that they are actually working the coal comprised in that lease. That is really not seriously disputed by the Coal Commission, and it necessarily follows that para. (*b*) has no application to this case. The plaintiff company do not come within the exception in para. (*b*), and, unless they come within H para. (*a*), their interests are retained interests within the meaning of the Act.

I must now turn to para. (*a*), the first part of which is as follows:

> interests arising under a coal-mining lease in coal or a mine of coal which is sub-demised by a coal-mining lease derived out of that lease . . .

In the present case, I think that it is impossible to suggest, and I do not think that it has been suggested by either of the counsel for the commission, that the lease of the plaintiff company comes within that part of the subsection. Quite plainly, it does not. Therefore, I need not consider those words any further. It is the following words of subsect. (2) (*a*) which have given rise to the question:

> . . . which is, by virtue of any other form of disposition taking effect directly or indirectly out of that lease, held in like manner as if it had been so sub-demised . . .

Mr. Spens, for the Coal Commission, has said with great frankness that to any lawyer who was reading those words it would be obvious that the particular lease in this case was not within the language so used. I think that Mr. Hunt did not accept that wholly, and he has suggested that to any person, including myself, those words, if properly read, do include such a lease as that with which I am dealing in the present case. Mr. Spens has really put his case, as I understand it, on this ground. He has said that the policy of the Act and the intention of the legislature as shown in the Act were to get rid of all interests in mines and minerals other than those of persons who, under leases, were actually working the mines and minerals at the date when the Act came into operation, and that, taking that as a general intention derived from the Act, the legislature must have intended to include such a lease as the present lease (a concurrent lease which is longer than the original lease), or otherwise the right which the commission will have, or have, under the Act to grant leases on such terms as they think fit will be postponed for a very long period. Further, he says that, unless the words do apply to an interest of this sort, there is nothing to which they can apply at all, and that the court is bound to give effect to all the language of the Act as a whole. I think that, however much force there may be in that argument, the real answer is that all that may be perfectly true, but it does not justify the court in deliberately putting a misconstruction on the language used in the Act for the purpose of twisting the words so as to give effect to what it has been suggested is the real policy of the Act. In my judgment, when one reads these words, it is perfectly apparent that the words cannot possibly be read so as to comprise this particular lease. I confess that Mr. Hunt produced a very ingenious argument, which had the merit of being extremely attractive to me, but I am quite convinced that it is wholly fallacious in fact. When one considers it, it is impossible to say that the lease of 1890 takes effect, either directly or indirectly, out of the lease of 1938. Mr. Spens has pinned his faith to the use of the word "indirectly" He says that that is a word of doubtful meaning, and is wide enough to sweep up, I gather, any interest which is not otherwise caught by the actual language of the Act. I cannot believe that the word "indirectly" can cover something which, in the terms of the Act itself, is clearly outside the language, and, in my judgment, whether or not there be any interests which are in fact comprised in it is not a matter for me. I am not bound to determine that there may be. I am by no means prepared to say that there are not interests, under licences or otherwise, which may be caught by this language, but I am satisfied in my own mind that it is impossible to read these words so as to comprise within the scope of this subsection the lease of the plaintiff company in this case. Mr. Spens has said that no doubt that would be so from the point of view of a person who has any acquaintance with conveyancing and legal terms, but that in popular parlance it is possible to read these words so widely as to include something which, on their proper construction, is not included. What the man in the street might think that these words convey to him I have not the least idea, but I am quite satisfied that the language itself, which I must construe, is not wide enough to include this particular lease. If I were to read the words so as to give effect to the argument of the defendants in this case, I should, in my judgment, be going outside my proper functions. I should not be construing the Act, but should be attempting to legislate, which is not permitted to me. If there is in fact a *casus omissus* here, it is for Parliament, and not for me, to consider whether it should be put right. My only duty is to construe the Act, and I cannot construe it except in the sense in which the plaintiffs ask me to construe it.

It follows that, in my judgment, this interest is a retained interest within the meaning of the Act, and I must make a declaration as follows:

> . . . upon the true construction of the Coal Act, 1938, and the Coal (Registration of Ownership) Act, 1937, the interests of the plaintiffs in the coal comprised in a lease, dated July 18, 1938, and made between the Bromborough Estates Co., Ltd., of the one part and the plaintiffs of the other part is a retained interest within the meaning of the Coal Act, 1938, s. 5.

I make that declaration in that form, and the plaintiff must have the costs of this summons.

Declaration that lease a retained interest.

Solicitors: *Herbert Reeves & Co.* (for the plaintiffs); *B. S. Jaquet* (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

HYETT *v.* LENNARD.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 3, 1940.**]

Income Tax—Trade expenses—Difference between rent paid for shop premises and rent received from sub-tenant—Shop one of number of chain stores closed owing to loss of profits—Business carried on at remaining stores—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, r.* 3 (*a*).

The respondent, who carried on business as a ladies' tailor at a number of shops, leased a further shop for the same purpose at a rent of £3,500 and for a term of 35 years, with no option of earlier determination. After several years, the respondent closed this shop, owing to the business there proving unprofitable, and then subleased it at a rent of £2,500. He continued to carry on his business at the remaining shops, and sought to deduct the difference of £1,000 between the rent which he was liable to pay and the rent which he received as being an expense wholly and exclusively laid out for the purposes of his trade within the meaning of Sched. D, Cases I and II, r. 3 (*a*) :—

HELD : as the respondent had to pay the rent of £3,500 pursuant to an obligation which he had entered into for the purposes of his trade, he was entitled to make the deduction claimed.

[**EDITORIAL NOTE.** It was decided in *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.* (1) that the rent of premises, now unoccupied but formerly occupied for the purposes of the business, was an admissible deduction in arriving at the balance of the profits of a trade. The facts of the present case are somewhat different, in that the lease was for a much longer period and the taxpayer had parted with the whole interest therein, with the exception of a few days, at a lower rent than he was bound to pay, but it is held that that distinction does not disentitle the taxpayer to deduct the difference between the two rents from his trading profits.

AS TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152, 153, para. 312, and pp. 156, 157, para. 321 ; and FOR CASES, see DIGEST, Vol. 28, p. 45, Nos. 227-229, and p. 46, Nos. 233-236].

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.*, [1933] S.C. 546 ; Digest Supp. ; 17 Tax Cas. 625.

(2) *Union Cold Storage Co., Ltd.* v. *Ellerker*, [1938] 4 All E.R. 692 ; Digest Supp. ; 22 Tax Cas. 457.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

F. Heyworth Talbot for the respondent.

MACNAGHTEN, J. : This is an appeal by the inspector of taxes against a decision of the special commissioners by way of a case stated under the Income Tax Act, 1918, s. 149. The respondent, C. Lennard, at all material times carried on business as a ladies' tailor at some 9 or 10 shops in London and its suburbs under the style of C. Lennard. On Oct. 26, 1930, the respondent took an assignment of a lease, dated Apr. 3, 1929, whereby the St. Edmunds Properties, Ltd., had leased to a company named James Walker (Jewellers), Ltd., the shop and premises No. 50, Oxford Street, for a term of 35 years from Lady Day, 1929, at a yearly rent of £3,500, for the purpose of carrying on his business of a ladies' tailor there. The lease gave the lessee no option to determine at an earlier date. The respondent carried on business at 50, Oxford Street, for about 4¾ years. For the first two years the shop proved profitable, but after that time it involved the respondent in serious and increasing losses, and in July, 1935, he closed down the shop, although he continued to carry on his business at his other 9 shops. The respondent was able to find a person who was prepared to take on the premises, but at a reduced rent. By an under-lease, dated July 29, 1935, he demised the premises to one Littman for a term of 28¾ years, less 5 days, from Lady Day, 1935, at a yearly rent of £2,500.

In these circumstances, the respondent claimed that the difference between the rent of £3,500 which he had to pay for 50, Oxford Street, to St. Edmunds Properties, Ltd., and the rent of £2,500 which he received from Littman was money wholly and exclusively laid out or expended for the purposes of his trade as a ladies' tailor in London and its suburbs.

I have been referred to a number of cases, but none of them, as it seems to me, raises the exact point raised in this case. If St. Edmunds Properties, Ltd., had been willing to accept a surrender of the lease, the cases cited show that a sum paid by the respondent to obtain their consent to its surrender would not be money wholly and exclusively laid out for the purposes of the trade within the meaning of Sched. D, Cases I and II, r. 3. If he could have found a person who would have taken an assignment of the lease, and he had paid to the assignee a sum of money in consideration of his doing so, that also would have been an expense which could not be deducted for the purposes of income tax. In this case, as in no other case which has been brought to my attention, except *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.* (1), the point has been raised where the amount which the taxpayer sought to deduct was the sum which he had to pay pursuant to an obligation into which he had entered for the purposes of his trade. The respondent took the assignment of the lease of 50, Oxford Street, for the purpose of carrying on his trade there, and, by the assignment, the whole residue of the term became vested in him, and he became liable to pay the £3,500 to St. Edmunds Properties, Ltd., for the residue of the term of 35 years. I ventured to put to counsel for the appellant the question whether, if the respondent had left the premises vacant for the rest of the term of the lease and had made no use of the premises at all, but had continued to carry on his trade as theretofore at his other shops, he would have been entitled year by year to deduct the rent of £3,500 as an annual expense of the trade. I am not quite sure what the answer was, but I think that they conceded that he would have been able to deduct it for a reasonably short time, but that he would not have been entitled to deduct it for so long as 28 years.

I think that he would have been entitled, in such circumstances, to deduct the £3,500 as a proper trade expense for the whole of the residue of the term of the lease, and for this reason. He had taken an assignment of the lease and entered into obligations imposed upon him thereby for the purposes of the trade, and it seems to me that the obligations which he thereby undertook continued to be expenses of the trade throughout the whole currency of the lease. I put the case of a contract of employment for a number of years, with an obligation, after the employee had attained a certain age, to pay the employee a pension, and it was agreed that in such a case the pension which the trader had agreed to pay was an expense of the trade properly deductible from his receipts, although, of course, during the years when the employee had ceased to do any work he was rendering no aid at all towards the carrying on of the business. I am fortified in this view by the opinions expressed by the Lord President (Lord Clyde) and Lord Sands in *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.* (1). In that case, the Falkirk Iron Co., Ltd., had taken a lease of a warehouse at Bristol for the purposes of their business. The lease was for 10 years, with an option to break it at the end of 5 years. After occupying the warehouse for the purposes of their business for a little over 2 years, the Falkirk Iron Co., Ltd., ceased to carry on any part of their business there. They sublet certain portions of the premises, but not the whole of them. It is in that state of facts that the Lord President said, at p. 550 :

> After a number of years they [the Falkirk Iron Co., Ltd.] discovered, contrary to their expectations, that they no longer had need of the premises [the warehouse at Bristol] ; and they remained empty and on their hands. In these circumstances, I have no doubt that the rent which they continued bound to pay until the termination of the tenancy was just as much a part of the expense laid out exclusively for the purposes of the company's trade as the rent of other warehouses in Glasgow, Edinburgh and Liverpool which continued to be profitably used.

The judgment of Lord Sands is to the same effect. He said, at p. 552 :

> If a company enters into contracts for the purposes of its business, genuinely and honestly—and nothing to the contrary is suggested here—I think that expenditure in the fulfilment of these contracts is expenditure for the purposes of the business. There may be extreme cases in the way of a very prolonged liability, but that is not the present case. It is just an ordinary matter of business, necessary for the purpose of carrying on the general business of the firm, that it should in ordinary course fulfil a simple contract of this kind, and the fulfilment of that contract is a fulfilment of one of the purposes of the business.

The decision in *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.* (1) does not, however, precisely cover this present case, because in that case the period of the lease during which the company had to pay rent when they were not using the warehouse at all was something less than 3 years. In this case, the period is something over 28 years, and, whereas in the *Falkirk Iron Co.* case (1) the company had not parted with the possession of the whole of the premises, in this case a subdemise of the whole of the leased premises has been granted for the full period of the lease, less 5 days. The lease was granted on Lady Day, 1929, and the sublease was for 28¾ years, less 5 days, from Lady Day, 1935.

However, do those facts, differentiating this case from the *Falkirk Iron Co.* case (1), make any difference to the conclusion which ought to be drawn ? I do not see on what ground it can be held that, if the lease has only 3 years to run, the rent continues to be a deductible expense, while, if it has 28 years to run, it cannot be deducted at all. If it was an expense of the trade during the first year or two after the business was no longer carried on at the premises, how could it cease to be an expense of the trade during the later years ? Similarly, I do not see how the fact that the respondent has got rid of all interest in the premises except the 5 days in 1964 can make any difference. If I am right in thinking that, if the respondent left the premises vacant, he could deduct the rental of £3,500 throughout the whole term of the lease, he surely cannot lose this right because he has been able to reduce his loss by subletting the premises for a smaller sum.

I desire to refute the suggestion that my decision in this case is inconsistent with the decision which I gave in *Union Cold Storage Co., Ltd.* v. *Ellerker* (2). The facts in that case were that by a payment of £6,000 the Union Cold Storage Co., Ltd., obtained a cancellation of a lease of premises at Liverpool granted to them by the London, Midland and Scottish Railway Co. The obligation to pay the £6,000 did not arise out of any contract made by the Union Cold Storage Co., Ltd., for the purposes of their business. It arose out of an agreement which they had made with the London, Midland and Scottish Railway Co. for the surrender of the lease. That is the distinction, and, as it seems to me, the vital distinction, between that case and this. In this case, the respondent has to pay the rent of £3,500 pursuant to an obligation which he entered into for the purposes of his trade. It is because he entered into that obligation wholly and exclusively for the purposes of his trade that, in my opinion, he is entitled to deduct it. Therefore, the result is that the appeal is dismissed.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *E. FitzGerald Sargent* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

WODEHOUSE *v.* LEVY AND ANOTHER (ST. MARYLEBONE BOROUGH COUNCIL, THIRD PARTY).

[KING'S BENCH DIVISION (Cassels, J.), **April 24, 25, 26, 29, 1940.**]

Emergency Legislation—Duty to light streets—Street refuge—Lighting restrictions—How far affecting obligation to light obstructions in street—Metropolis Management Act, 1855 (*c.* 120), *ss.* 108, 130—*Lighting* (*Restrictions*) *Order,* 1939 (*S.R. & O.,* 1939, *No.* 1098), *paras.* 1, 4 (*d*).

Highways—Obstructions—Lighting of obstructions—How far duty affected by lighting restrictions.

The plaintiff, while travelling in a taxicab during the hours of black-out on Sept. 1, 1939, was injured when the cab collided with an unilluminated bollard at the end of a refuge in a road which was in the district of the defendant local authority. The refuge was erected by the local authority under the powers conferred upon them by the Metropolis Management Act, 1855, s. 108. Under sect. 130 of the same Act, they are under an obligation to light the streets in their district. On Sept. 1, 1939, the Lighting (Restrictions) Order, 1939, came into force, but it contained a provision that it should not apply (*inter alia*) to lamps indicating obstructions upon the carriageway of a road, provided that they did not exceed one candlepower and were properly screened. It was contended on behalf of the local authority that this order negatived the duty under the Metropolis Management Act, 1855, s. 130, to light the streets :—

HELD : the order did not abolish the duty, which was founded both upon the statute and upon common law, to light obstructions in the streets, and while the restrictions remained in force, the local authority were under a duty, where there was diminished or no street lighting, to indicate obstructions during the hours of darkness by means of lamps which did not offend against the provisions of the order.

[**EDITORIAL NOTE.** The Emergency Regulations restricting lighting do not absolve a local authority from lighting such obstructions in the carriageway and both their statutory and their common law duty to do so remain unaffected in principle, though under the regulations the amount of light to be used for this purpose is restricted.

As to Lighting Obstructions in Highway, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and for Cases, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to:

(1) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, *1190*; 120 L.T. 470.

(2) *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K.B. 195; 26 Digest 515, *2190*; 89 L.J.K.B. 554; 123 L.T. 299.

(3) *Polkinghorn* v. *Lambeth Borough Council*, [1938] 1 All E.R. 339; Digest Supp.; 158 L.T. 127.

(4) *Great Central Ry. Co.* v. *Hewlett*, [1916] 2 A.C. 511; 26 Digest 419, *1383*; 85 L.J.K.B. 1705; 115 L.T. 349; *revsg.*, 114 L.T. 713.

(5) *Sheppard* v. *Glossop Corpn.*, [1921] 3 K.B. 132; 26 Digest 393, *1197*; 90 L.J.K.B. 994; 125 L.T. 520.

(6) *Kent and Porter* v. *East Suffolk Rivers Catchment Board*, [1939] 2 All E.R. 207; Digest Supp.; *affd.*, [1939] 4 All E.R. 174; 161 L.T. 341.

Action for damages for injuries sustained through the collision of a taxicab with an unlighted street refuge. The plaintiff sued the owner and the driver of the taxicab for negligence, and they thereupon served a third-party notice upon the local authority alleging that the accident was caused by their negligence or breach of duty in failing, by lights or otherwise, to indicate the presence of the refuge as an obstruction in the road. The plaintiff then obtained leave to add the local authority as defendants, and amended his statement of claim to make the same allegations against them. They pleaded that the Lighting (Restrictions) Order, 1939, repealed the duty under the Metropolis Management Act, 1855, s. 130, to light the streets, and it is upon this point only that the case is reported.

G. Russell Vick, K.C., and *N. R. Fox-Andrews* for the plaintiff.

Montague Berryman for the first and second defendants.

S. R. Edgedale for the third defendants, the third party.

Cassels, J. The plaintiff, a student at the London University, is legally an infant, being 20 years of age, and brings this action through his mother as next friend. The first and second defendants are the owner and the driver of a taxicab. The third defendants, a local authority, have charge of the lighting of the streets in the metropolitan borough of St. Marylebone. The plaintiff, having been to France, arrived at Victoria Station, London, very late on the night of Sept. 1, 1939. He was alone. He hired the taxicab driven by the second defendant for the purpose of going to Swiss Cottage. It was the first night of the

black-out, and very dark, and, according to the second defendant, it was very wet and drizzling with rain. Lighting, both in the streets and upon vehicles, was restricted by law. At 12.55 a.m. on Sept. 2, this taxicab, driven in a northerly direction along the Finchley Road, came into violent collision with an unilluminated bollard at the south end of
A a refuge in the middle of the road near Marlborough Road station, and the plaintiff was thrown into the glass partition between the passenger and the driver, sustaining severe injuries, which included a broken nose, in respect of which the damages have been agreed at £275, subject to my approval.

B The action began against the first and second defendants, and it was alleged that the taxicab was being driven too fast, in the circumstances, and without a proper look-out. The first and second defendants by their defence put the blame on the St. Marylebone Borough Council. They said that the accident was occasioned solely by the negligence or
C breach of duty of the borough council in failing, by lights or otherwise, to indicate the presence of the refuge as an obstruction in the road, and they served a third-party notice upon the council. Upon this, the plaintiff obtained leave to add the council as defendants, and amended his statement of claim by making the same allegations against the
D council. Thereupon, the council pleaded that they had placed upon the refuge such lights as they were allowed to use by law, and that, if there were no lights there at any material time, they were out or removed through no fault of theirs, and that the matters complained of amounted to no more than non-feasance. This particular refuge has been in its
E present position for about 4 years, according to the deputy engineer to the third defendants. It contains a high double-bracketed lamp standard in the centre, and solid guard-posts at each end. It was put there because the place had been the scene of accidents to pedestrians. After the refuge had been installed, many vehicles hit it. Illuminated guard-
F posts or bollards were added long before Sept. 1, 1939, to supplement the guard-posts, and these were kept illuminated by the council every night.

The imposition of lighting restrictions was foreseen long before the war. As early as Feb. 14, 1938, the Air-Raid Precautions Department
G of the Home Office issued to local authorities a memorandum on lighting restrictions in time of war, setting out the general lines of the restrictions which might be expected to be imposed in the event of war, so that local authorities might be aware of the nature of the preparations which would be required in advance of a war emergency. Both then and for
H some time after, the matter was the subject of investigation, but even then, in that memorandum, it was stated that lights of some kind would be used to mark obstructions. On June 1, 1939, the Home Office distributed to local authorities a memorandum on aids to the movement of traffic to be installed in roads and streets in the absence of street-lighting. This dealt with traffic signals, warning and directions signs,

and, so far as this case is concerned, with obstruction lighting. It dealt with the screening of panels in the heads of illuminated bollards, and further stated as follows, at p. 7:

> Obstructions. Obstructions on the carriageway of all roads, not merely those which are equipped fully with aids to movement, must be indicated by lights to drivers at night. Dimmed and well-screened hurricane lamps which throw no light above the horizontal and cast no appreciable glow on the road surface should be used for this purpose. The candlepower of all lamps used for marking obstructions must be reduced to a figure not exceeding one. A

Local authorities were recommended to make up and store necessary screens for masking hurricane lamps, and to obtain and store a reserve of suitable screened and dimmed obstruction-marking lamps. It is true B to say, as the third defendants said in their defence, and contended, that this memorandum had no legal effect, but it was a powerful warning of what was expected of local authorities, and the defendant council made very strenuous efforts to prepare for the emergency. They had purchased a large quantity of hurricane lamps prior to Sept., 1938, C but, by Sept. 1, 1939, they had not succeeded in getting screens for all the illuminated bollards in the borough. There was difficulty in getting the material, because every local authority wanted it at the same time.

On Sept. 1, 1939, there came into operation the Lighting (Restrictions) Order, 1939. This order was made by the Home Secretary under the D Defence Regulations, 1939, and, of course, it has the force of law. Indeed, it was not contended otherwise. It is necessary that this order should be considered in detail, so far as it relates to this case. Para. 1 provided, "subject as hereinafter provided," that no person should show any light during the hours of darkness. Para. 4 provided that the general pro- E hibition of lights should not apply to certain specified lights for the guidance of traffic in roads. Among these specified lights were lights in traffic-signals, provided that they were masked in a particular manner, screened prohibitory and mandatory signs, screened lights in the heads of bollards, and, by subpara. (*d*): F

> . . . lamps indicating obstructions upon or near the carriageway of any road, provided that they are of candlepower not exceeding one and so screened as to prevent light being thrown upwards and any appreciable glow being produced on the road surface.

There was nothing new about the wording of this paragraph in the G order with regard to the lighting of obstructions. Indeed, it follows very nearly in its wording that of the Home Office memorandum issued to local authorities in June, 1939.

I have not been satisfied that at any time that night there were lamps upon this particular refuge, and I find that it was an unlighted obstruc- H tion in the road. It is said by the deputy engineer that in two nights the council lost 100 hurricane lamps out of 1,000, but this evidence is too vague for me to hold that the lamp from the southern end of this particular refuge was stolen.

The Marylebone Borough Council placed this refuge in the middle of

Finchley Road by virtue of the Metropolis Management Act, 1855, s. 108, which provides as follows:

> It shall be lawful for every vestry and district board from time to time to place any posts, fences, and rails on the sides of any footways or carriageways in their parish or district, for the purposes of safety, and to prevent any carriage or cattle from going on the same, and also to place any posts or other erections in any carriageway so as to make the crossings thereof less dangerous for foot passengers, and also from time to time to repair and renew any such posts, rails, or fences, or to remove the same, or any other obstruction or encroachment on any carriageway or footway.

By sect. 130 of the same Act, they have the duty to light the streets. That section provides as follows:

> Every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as such vestry or board may think fit, necessary, or proper; and all public lamps, and the lamp posts and lamp irons and fittings thereof, to be provided by any vestry or district board, shall vest in such vestry or board.

This is not the first time that the lighting of streets has been restricted by reason of war. During the Great War there were lighting restrictions, and these two sections of the Metropolis Management Act, 1855, and the common law duty of metropolitan borough councils came up for consideration in the Court of Appeal. In *Baldock* v. *Westminster City Council* (1), a taxicab driver drove his cab on to an unlighted refuge and suffered damage. The refuge was unlighted by reason of the erratic character of the light. The case first came before a jury in the county court, who found negligence on the part of the defendants in omitting to maintain a danger lamp on the refuge. The county court judge entered judgment for the defendants, on the ground that there was no evidence of negligence. The Divisional Court (Lush and Bailhache, JJ.) allowed the plaintiff's appeal, whereupon the defendants appealed to the Court of Appeal. Bankes, L.J., said, at p. 502:

> With regard to the duty the position appears to be this. The defendants are, under the Metropolis Management Act, 1855, s. 130, under a duty with regard to lighting the streets, and by sect. 108 they have the power conferred upon them of placing fences and posts and arches upon the footways, carriageways, and so forth, and placing posts or other erections in any carriageway, so as to make the crossing thereof less dangerous. They have, therefore, under those two sections, power conferred, and a duty imposed, upon them. Under that power they had the right to erect this particular shelter, and the statute imposes no special duty upon them to light it, but does impose upon them the general duty to cause the streets within their district to be well and sufficiently lighted, and I should say *prima facie* that that duty included a duty to provide sufficient light to indicate the position of any obstructions which they place in the street under the powers conferred upon them by sect. 108. Lush, J., in his judgment, seems to have doubted whether anybody could quarrel with the discretion of the local authority in reference to the amount of light necessary, and we have not heard that question argued: but, for myself, I desire to say that I should like to hear the matter fully argued before I assented to the proposition laid down by Lush, J.; but it is not necessary or material to come to any decision upon that matter for the purposes of this appeal. It is quite true that during the war under statutory power, or its equivalent, the Government had given directions under which the amount of light in the street had to be very materially diminished, and to that extent, of course, the obligation upon the local authorities to provide a sufficient light was reduced, and it may well be that it was competent for them to have extinguished all the lights upon shelters in any

> part of their district without incurring liability to anybody. I am not prepared to express any opinion about that, because the regulations which were made have not been before us. The fact is that, in spite of these regulations, this particular local authority did continue to light all the shelters to which lights were provided, and that fact, in my opinion, imposes a duty upon them—it may be a self-imposed duty, but it is none the less a duty—and it becomes a duty, in my opinion, in this way: The local authority have no right to lay traps for people in their streets, and they would not contend for a moment that they had. If a local authority consistently lights all the shelters in its streets, it publicly A indicates to the persons who are in the habit of traversing those streets that the shelters are still lighted, and if it comes to the knowledge of the local authority that the lights which they so provide are untrustworthy or erratic, and are sometimes out and sometimes in, the local authority, I think, are providing something which is in the nature of a trap to the travelling public, because the public are allowed to believe that the shelters are lighted, and to the knowledge of the local authority they are sometimes lighted and sometimes not. B

A little further on, he says, at p. 503:

> In my opinion there was a duty, it may be a self-imposed duty, on the local authority, in regard to this particular lamp, on this particular shelter, on this particular night, and there was evidence upon which the jury could come to the conclusion at which they came in regard to this particular lamp on this particular night. C

In the same case, Scrutton, L.J., said, at p. 504:

> There was evidence before the jury that, owing to the restriction of the lighting system, some of the lights were erratic, because it was difficult to maintain pressure. There was evidence that, owing to the shortage of labour, it took some considerable time before the central authorities knew when the light was working erratically. Under those circumstances the jury found that on this refuge a red light should have D been placed. I do not read that myself as a finding of such a character that the defendants need be afraid that on every refuge they should put a red light; it must depend on the circumstances both of the particular refuge and of the lighting system and the inspection system at the time, but the jury found that, at that time, under that system of lighting, under that system of inspection, the corporation ought to have put a red light on their refuge.

E

The Court of Appeal dismissed the defendants' appeal.

In *Carpenter* v. *Finsbury Borough Council* (2), Shearman, J., held the council liable in damages for the death of a post-office van driver who was crushed by the roof of the arch in a street along which he was driving, owing to the lighting being insufficient to give notice of the existence and height of the archway. This accident, it is to be noted, F happened in Mar., 1918, during a time of reduced lighting under lighting restrictions.

The same sections of the Metropolis Management Act, 1855, and the common law duty of local authorities in regard to lighting came up for consideration in *Polkinghorn* v. *Lambeth Borough Council* (3), an appeal G from a county court. A refuge had been erected in the road for the convenience of tram-passengers. At each end was an illuminated bollard. The lighting in the bollard went out prematurely, and the plaintiff was injured in the early morning by coming into contact with the bollard. Slesser, L.J., said, at p. 341: H

> Under the Metropolis Management Act, 1855, s. 108, it was made lawful for every vestry and district board—and the metropolitan borough of Lambeth are the inheritors of the powers of those vestries and district boards—from time to time to place erections in the carriage way so as to make crossings less dangerous for foot-passengers, and to put posts, rails and fences and the like. There is no doubt at all that they had ample and sufficient power to erect this island, and to place the

> bollard at the end of it. Having utilised their statutory right to place this refuge there, and this bollard, they, being clothed with the statutory duty or power to do that act, in the language of LORD WRENBURY, in *Great Central Ry. Co.* v. *Hewlett* (4), must in doing it exercise reasonable care to prevent injury to others. The county court judge has found that they have failed to exercise that reasonable care, because they have failed to keep lighted the lamp, which would have shown a driver on the highway that the bollard was present. In my opinion, the finding of the judge in this case is fatal to the appellants' contention here. The obligation, so long as the bollard is in the street and it is dark, is to keep it lighted, and they have failed so to do. It matters not, therefore, *prima facie*, in the absence of some possible explanation excusing their performance of their obligation to render the bollard safe, that it cannot be explained how the light failed. The obligation to keep the light burning was, in my opinion, for so long as the bollard was a danger by reason of the fact that it was dark, a continuing obligation. In other words, there was as much obligation to keep the light burning at the moment of the accident as there was at any other time during the night.

In the same case, SCOTT, L.J., referred to sect. 130 of the Act, and said, at p. 342:

> Under that section, it was clearly the duty of the Lambeth Council to maintain a light, which would prevent one of the obstructions, properly erected, under sect. 108 for the purpose of assisting foot-passengers, from being a danger to motor traffic in the road.

Further on, in the course of his judgment, after dealing with the facts, he said, at p. 343:

> In those circumstances, my view is that the legal position is a very simple one. It is that, whether one regards the case from the point of view of statutory duty or from the point of view of common law negligence, in either case the failure to maintain the light is all it is necessary for the plaintiff to prove, in order to establish his right to damages, unless after that evidence the defendant council gave affirmative evidence to displace the onus which was put upon them to disprove liability for the accident. In the absence of evidence satisfying the judge that they had been guilty of no fault, and that the cause of the light being extinguished was some cause for which they were not responsible in law, the liability for the accident remained upon them.

At the end of his judgment, he said, at p. 343:

> In the circumstances, in my view, the case is a very simple one, and is, *prima facie*, a case of negligence and breach of statutory duty, no answer being attempted, or successfully established, by the defendants to displace that onus.

However, FARWELL, J., who was also a member of the court, preferred to deal with the case as one of negligence rather than as one of breach of statutory duty. He said, at pp. 343, 344:

> Having regard to the way in which this matter came before the county court judge, and to the way in which it was dealt with by him, I prefer to deal with it as a case of negligence rather than as a case of breach of any statutory duty. By that I do not in the least mean that I differ in any way from the judgment of SLESSER, L.J., but, having regard to the way in which the county court judge dealt with it, I prefer to deal with it as a matter of negligence. At and immediately before the critical moment of the accident, this bollard was unlighted, and it was the fact that it was unlighted that caused the accident. That has been found by the county court judge as a fact, and there is no suggestion of any contributory negligence on the part of the plaintiff. The failure to light the bollard was, in my opinion, quite plainly a negligent act on the part of the defendants. The bollard represented an obstruction to the highway, and to leave it unlighted in the dark was common law negligence. The only explanation of the failure to keep the bollard lighted put forward by the defendants was that it was lighted at some other time. That appears to me to be wholly irrelevant. It may have been alight at some other time, and the fact that it was not lighted at the particular time may not be capable of explanation, but it is in no way sufficient to discharge the onus which, in my judgment, rests upon the defendants, to show that they were not negligent in having failed to keep the bollard lighted, to say that it was lighted at some other

time of the night. For these reasons, in my judgment, the county court judge was right in the conclusion to which he came, and this appeal should be dismissed.

Counsel for the third defendants referred to *Great Central Ry. Co.* v. *Hewlett* (4) which was mentioned in the judgment of SLESSER, L.J., in *Polkinghorn's* case (3), but that was a case arising in very unusual circumstances. The railway company had erected a gatepost in the public highway in contravention of their special Act. In 1901 this was judicially held to be an obstruction. In 1902, the railway company obtained an Act which legalised the existence of the gatepost, and it was held that the mere power to maintain a post imposed no obligation on the company to take reasonable precautions to warn the public of its existence. The railway company, as LORD SUMNER pointed out, at p. 522, were not the lighting authority for the area in which the post was, nor were they under any express obligation to light it.

Counsel for the third defendants relied also upon *Sheppard* v. *Glossop Corpn.* (5), where the plaintiff, going home at night, missed his way, strayed on to some private land, fell over a retaining wall into an unlighted street in Glossop, and was injured. This street was lighted by the defendants, but the lights were extinguished every night at 9 p.m., and it was after this hour that the plaintiff suffered damage. It was held that the defendants had done nothing to make the street dangerous, and, in so far as they lighted the streets, they did so under the Public Health Act, 1875, s. 161, which conferred upon them a discretion, but not an obligation, to light. It is to be observed, however, that in that case SCRUTTON, L.J., said, at p. 144:

> It is necessary to say that this is not a case under the Metropolis Management Act, 1855, and nothing I am about to say has any application to local authorities exercising the powers of that Act, which imposes a standard of liability entirely different from that imposed by the Public Health Act, 1875, s. 161.

Later, he said, at p. 145:

> Mr. Eastham admitted that the appellants were not bound in the first instance to light the borough at all. Then if they have once begun to light, are they bound to continue? Mr. Eastham answered, Yes. I am unable to agree. It is left to their discretion to light or not to light; therefore they need not light at all; if for a time they light they may discontinue either wholly or partially in point of time or in point of space, and the mere discontinuance is no breach of duty. That is, of course, subject to this: that if they place an obstruction in the highway they must by lighting or warning, or by watchmen or fences or other reasonable means, guard against the danger they have themselves created.

It was contended by counsel for the third defendants that the Lighting (Restrictions) Order, 1939, had repealed the duty of the local authority to light streets under the Metropolis Management Act, 1855, s. 130. I am unable to accept that view. The prohibition of lights in para. 1 is expressly stated in para. 4 not to be applicable to lamps indicating obstructions if they comply with certain requirements. The third defendants cannot plead the Lighting (Restrictions) Order, 1939, for not having lighted this obstruction. The order has certainly modified the duty as expressed in the statute to cause the several streets within the parish to be well and sufficiently lighted, but it has not abolished the duty to light obstructions in the streets, which is founded both upon the statute and upon the common law, as the decided cases show. The present lighting restrictions do not relieve metropolitan local authorities from lighting obstructions such as refuges in the streets. So long as these restrictions remain in their present form, their duty is that, where there is an obstruction in a street in the metropolis, and there is diminished or no lighting in the streets, such an obstruction must be indicated during darkness by lamps which do not offend against para. 4 (*d*) of the order. Where the obstruction is in the nature of an illuminated bollard upon an island refuge, then that should have a light in accordance with para. 4 (*c*) of the same order.

The final contention of counsel for the local authority was that at most, in the circumstances of this case, the council have been guilty of non-feasance, and for such are not liable. I am not able to accede to this argument. Non-feasance in its usual, and probably in its strict, applicability, concerns highway authorities, and in this case the third defendants are not sued as a highway authority, and the accident has nothing to do with the non-repair of a highway. Failure to exercise powers, but not duties, conferred by statute creates no liability. That, too, is non-feasance. The incompetent exercise of these powers is another matter: *per* SLESSER, L.J., in *Kent and Porter* v. *East Suffolk Rivers Catchment Board* (6). In that case, MACKINNON, L.J., said, at p. 178:

> . . . a public authority that is empowered to do a thing, but not ordered to do it, may with impunity abstain from doing anything.

Here the third defendants were under a statutory duty to light the streets, and under a statutory and common law duty to light obstructions. It would be fantastic to say that they might light some obstructions and not light others, or light an obstruction one night and not light it the next, and then say that their failure to light was non-feasance. I am compelled to reject the argument.

I find, therefore, that the defence of the third defendants fails upon all grounds. They were guilty of a breach of duty, both statutory and at common law in negligence, in failing upon this night to light this obstruction upon the road, and that was a cause, and the principal cause, of the damage suffered by the plaintiff, who is entitled to recover damages against them.

Judgment for the plaintiff for £275 with costs against all the defendants. Order that third defendants pay three-quarters and first defendant and second defendant one-quarter of the plaintiff's damages and costs.

Solicitors: *F. J. Stewart* (for the plaintiff); *A. D. Vandamm & Co.* (for the first and second defendants); *William Charles Crocker* (for the third defendants, the third party).

[*Reported by* A. GRIMBLE, ESQ., *Barrister-at-Law.*]

CHANDLER *v.* EMERTON AND OTHERS.

[King's Bench Division (Charles and Humphreys, JJ.), **May 24, 1940.**]

Intoxicating Liquors—Licence—Occasional licence—Jurisdiction to grant applications made regularly—Application in respect of premises regularly used for dance functions—Licensing (Consolidation) Act, 1910 (c. 24), *s*.64.

The appellant applied for occasional licences to sell intoxicating liquors at certain premises on 3 specified nights in each week of June, 1940, when dances were to be held at those premises. During the previous 5 years, similar applications by the appellant had been regularly granted. The justices decided that they had no jurisdiction to grant the application, considering that the word "occasional" was a complete bar to the grant of applications made regularly:—

Held: the word "occasional" did not constitute a complete bar to the grant of applications made regularly.

[**EDITORIAL NOTE.** The short point in this case is whether or not the word "occasional" is a complete bar to the grant of applications regularly made for occasional licences. This was the view taken by the justices to whom such an application was made, but, on appeal, the Divisional Court has held that the word "occasional" does not constitute any such bar, and that the justices must hear and determine each application on its merits.

As to Occasional Licences, see HALSBURY, Hailsham Edn., Vol. 19, pp. 113-115, paras. 269-271; and for Cases, see DIGEST, Vol. 30, pp. 73, 74, Nos. 583-588.]

Case Stated by way of appeal from a decision of licensing justices upon an application under the Licensing (Consolidation) Act, 1910, s. 64, for the grant of occasional licences to sell intoxicating liquors at the Royalty Hall, Southgate, on Tuesdays, June 4, 11, 18, 25, 1940, on Thursdays, June 6, 13, 20, 27, 1940, and on Saturdays, June 1, 8, 15, 22, 29, 1940. The licences were sought in respect of dances to be held at the Royalty Hall on those dates. Such dances had previously been held at the Royalty Hall on Tuesdays and Thursdays since Oct., 1935, and on Saturdays since Oct., 1939, and occasional licences had been regularly granted in respect of these functions until Feb. 9, 1940. The justices to whom the application (along with other applications, but dealt with separately) was made, said:

> . . . on the facts proved and admitted before us we had no jurisdiction to grant the said applications considering the word "occasional" constituted a complete bar to the grant of applications made regularly . . .

They accordingly refused the applications, whereupon the applicant brought this appeal.

Sidney Lamb for the appellant.

Christmas Humphreys for the respondents.

Charles, J. [delivering the judgment of the court]: The conclusions to which we have come upon this special case I can put very shortly. Chandler, the appellant here, made application, as he has done many times before since 1935, apparently, for it is a series of dances, for occasional licences at a building known as the Royalty Hall, Southgate. Up to Feb. 9, 1940, those applications had been regularly granted, it is found. They had been regularly granted for the reason that Chandler is evidently a fit and proper person, and the Royalty Hall, at which A premises a large variety of functions are held, is properly equipped and in every way suitable in respect of which to grant such licences. It is for the convenience of the public who go to entertainments or dances or meetings there, because there is no other similar establishment anywhere within reasonable distance which affords similar facilities B as the Royalty Hall. The occasional licences which have been granted for some years with respect to this Royalty Hall are desirable, because on those premises there would be a suitable buffet, food would be eaten, and then drink would be taken, sometimes with the food and sometimes without the food. They are not licensed premises, however. The C nearest licensed premises are 200 yds. away, and so the journey there and back to get a drink would amount to 400 yds. The application was then made for Tuesdays, Thursdays and Saturdays, and a lot of applications were all put together, although they were considered separately. The justices refused these occasional licences. They had un- D doubted jurisdiction, if they gave consideration to the matter, to refuse, if they thought for some good reason that the occasional licences ought not to be granted. They might think that the occasions were too frequent, perhaps. They might think that the occasions were not proper. There are numerous reasons whereby an authority can exercise E its undoubted jurisdiction. Unfortunately, here they did something quite different. They said :

> We being of the opinion that the contentions of the appellant were wrong and that on the facts proved and admitted before us we had no jurisdiction to grant the said applications considering the word " occasional " constituted a complete bar to the grant of applications made regularly and accordingly refused them.

F

That is to say, it is no longer a question of discretion, because, if the word " occasional " constitutes a complete bar to them, they have no business to consider whether they will grant a licence to the same man once or twice or thrice. The word " occasional " is a complete G bar to their jurisdiction.

We are quite clear that, whatever may be the rights and wrongs of this matter, and whatever may be the direction in which the justices will find it proper to exercise their discretion in these matters, when we are asked whether they were right in law and were acting within their H jurisdiction in refusing the applications on the sole ground that the word " occasional " prevented them from so doing, the answer of this court is in the negative: They were not right in law in refusing the applications on the sole ground that the word " occasional " prevented them from doing so. That being the conclusion to which we have come, the matter must be remitted to the justices with the expression of the opinion of this court that the word "occasional" does not constitute a complete bar to the grant of applications made regularly.

Appeal allowed. No order as to costs.

Solicitors: *Martineau & Reid* (for the appellant); *C. W. Radcliffe*, Solicitor to the Middlesex County Council (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

EICHENGRUEN *v.* MOND AND OTHERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), **June 3, 1940.**]

Aliens—Enemy alien—Action commenced before war—Claim barred by lapse of time—Right of defendant to dismissal of action during war.

The plaintiff was at all material times resident in Germany. In Dec., 1938, he commenced an action against the defendants in respect of certain transactions which took place in 1915. The pleadings were closed in Aug., 1939. On the outbreak of war, the plaintiff became an enemy alien. In Nov., 1939, the first defendant gave notice to the solicitors who were on the record as having acted for the plaintiff that he intended to apply to the court for the dismissal of the action, in view of certain admissions made by the plaintiff in Aug., 1939. As the solicitors in question were unable to communicate with the plaintiff, they did not represent him upon this application:—

HELD: the rules of court had been complied with, and the action, as it was upon its face quite unsustainable, must be dismissed, notwithstanding the fact that the plaintiff was an enemy alien.

[**EDITORIAL NOTE.** The effect of this case is that, although the plaintiff is an enemy alien, a defendant to an action which is hopelessly ill-founded is entitled to have that action dismissed. It is, of course, generally impossible to communicate with an enemy alien, but, if the action has any merits at all, it seems that the court will make an order keeping the action alive until such time as the enemy alien may be heard.

AS TO POSITION OF ENEMY ALIEN, see HALSBURY, Hailsham Edn., Vol. 1, pp. 455-457, paras. 771-774; and FOR CASES, see DIGEST, Vol. 2, pp. 154-162, Nos. 250-329.]

Cases referred to:

(1) *Robinson & Co.* v. *Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; 2 Digest 158, *292*; 84 L.J.K.B. 238; 112 L.T. 125.

(2) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel (S.) & Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 2 Digest 159, *293*; 84 L.J.K.B. 1001; 112 L.T. 313.

APPEAL by the first defendant from an order of SIMONDS, J., dated May 2, 1940. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. SIMONDS, J., after stating the facts, gave judgment in the following terms.

SIMONDS, J.: The defendants are seeking to have the plaintiff's action against them dismissed, on the ground of certain admissions made by him, although the fact is clear that there was nobody to argue on his behalf that such an order ought not to be made, and

although it is plain that he personally had no knowledge of these proceedings and no opportunity of taking any steps to meet them. I was extremely reluctant to allow the matter to proceed to further argument until it had been ascertained that the plaintiff himself had been made aware of this step which was being taken in the action, and had been
A given the opportunity, if it should be given to him, of instructing other solicitors and counsel to argue the matter on his behalf.

In the circumstances, I do not think it necessary to decide whether, in the absence of such a further step, the matter ought to be proceeded with. I yielded to the invitation to consider whether or not an order such
B as that asked for ought to be made in any circumstances, and I have come to a clear conclusion upon it, which makes it unnecessary to consider further whether, in the absence of the plaintiff, and of anybody to argue the matter on his behalf, any further steps should be taken. The nature of the proceedings is as follows. The action is one in which the plaintiff
C claims that, as a shareholder in the defendant company, he became entitled in 1915 to certain rights. The year 1915 fell within the period which we were, in our innocence, accustomed to call the Great War, and he was in that war, as he is in this, an enemy alien. Accordingly, it is said that, having regard to the admissions which he has made in this
D action—namely, that he is, and always has been, a German subject, that he was resident in German territory throughout the period of the Great War, and certain other admissions which really hinge on that—his action cannot possibly succeed, and I am invited, under the jurisdiction of the court exercised in that regard, to strike out his statement
E of claim, dismiss his action, and enter judgment for the defendants.

The jurisdiction of the court to do such a thing as that is one which must be exercised sparingly, and with the utmost caution, and, although it may well be that the claim of the plaintiff in this case is one which he may have the utmost difficulty in maintaining, I find it impossible to say
F that it is a claim of such a character that it might be struck out, even assuming that he were here, without the opportunity of arguing the matter on the hearing of the action. This is not such a case as justifies me in saying that the plaintiff cannot possibly, in any circumstances, maintain his action, and that it ought not to be allowed to proceed. In my
G judgment, it is a case in which he should have the opportunity of arguing what is the effect of the outbreak of war upon such rights as were given to him by the articles of the company of which he is a shareholder. I think that this is not a case in which I ought to exercise the summary jurisdiction of striking out the statement of claim and entering judgment
H for the defendants.

Accordingly, having yielded to the invitation, and having looked into the matter, I must refuse the application which has been made, and, as I say, I do not purport to give any decision upon the question whether the proceedings ought to be allowed in the absence of such a notification to the plaintiff himself as to enable him, if he thinks fit, to instruct solicitors and counsel to argue the matter on his behalf. The application must be refused, and, in the circumstances, I think that the best course would be to reserve the costs of the application.

The first defendant appealed.

W. P. Spens, K.C., and *Hon. H. Fletcher Moulton* for the appellant.

The first respondent, the plaintiff, was not represented.

J. F. Bowyer (for *E. Blanshard Stamp* on war service) for the second and third respondents, the defendants other than the appellant.

Spens, K.C.: The point is whether or not the outbreak of war is to be allowed to operate in such a way as to inflict a hardship upon a British subject because his opponent happens to be an enemy alien. If this action brought by an enemy alien is to lie dormant during the war, the position will be a serious one for other directors of the company. The court must exercise a strong jurisdiction, but the matter is unarguable. R.S.C., Ord. 67, r. 2, states how service may be effected. The result of R.S.C., Ord. 4, r. 1, and R.S.C., Ord. 12, r. 8, is that the address of a plaintiff's solicitor or of a defendant's solicitor is an address for service. It is stated in THE ANNUAL PRACTICE, 1940, p. 1539:

> Until the judgment in the action has been worked out the solicitor on the record must be taken as between him and the opposite party to represent the client unless the client not only discharges him but substitutes another solicitor on the record.

There is no rule of common law which prevents an enemy alien from appearing to conduct his defence: *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (1). The principle which was acted upon in *Porter* v. *Freudenberg* (2) should be acted upon in the present case. In *Porter* v. *Freudenberg* (2), there was ample authority to justify the statement that the first care of the court is to protect a British subject. It is appreciated, of course, that, in ordinary circumstances, the court does not like to make an order in the absence of one of the parties. However, it is contrary to no principle of justice that the appellant should be held entitled to get rid of this litigation. Under the rules of the court, a solicitor on the record continues until another is appointed. The appeal in *Porter* v. *Freudenberg* (2) was lodged on Aug. 28, 1914, which was after war had broken out. The appellant comes within the principle that subjects of this realm should not be embarrassed because an enemy plaintiff fails to appear. If the plaintiff were a British subject, an order would be made.

Bowyer: Under its inherent jurisdiction, the court can strike out the statement of claim as against all the defendants. The court should strike out para. 3 of the statement of claim, in which relief is claimed against the company.

SIR WILFRID GREENE, M.R.: On Dec. 2, 1938, a writ was issued by the plaintiff in the action, Arthur Eichengruen, who resides in Berlin. The writ was issued by a firm of solicitors, and that firm remain the solicitors for the plaintiff on the record. The statement of claim, which was delivered on Jan. 20, 1939, is a remarkable document. It claims relief in connection with certain transactions which took place as long ago as 1915, and, complaining, as he did, of those transactions, it was essential for the plaintiff to construct a cause of action, if he could, which would prevent the Statute of Limitations from being set up as a defence. It appears from the statement of claim that the plaintiffs and certain others, including the first defendant, Dr. Mond, and the second defendant, Barr, were in 1915 shareholders in the defendant company, Cellon (Holding) Co., Ltd. The statement of claim refers to cl. 5 (*a*) of the company's memorandum of association, under which the holders of shares in the original capital were to be entitled to take up any shares created by an increase of capital, and such holders were to receive notice of every determination to issue further capital, and were to have at least 21 days within which to subscribe for their proportion.

In Sept., 1915, the defendant company increased its capital, and resolutions were passed pursuant to which 2,500 shares, forming part of the increased capital, were allotted to 4 shareholders, the defendant Dr. Mond, the defendant Barr, and two others. No shares were allotted to the plaintiff, for the very good reason that at that time he was an enemy alien, and no shares could lawfully be allotted to him. If it had not been for that circumstance, and if the provisions of the memorandum of association had been complied with, the plaintiff would have been entitled, when the new issue was made, to receive, or to be offered, an allotment which he could accept or not, as he pleased, of his appropriate proportion of the new shares which were being issued. He alleges that no notice of the intention to issue fresh capital was given to him, and that he had no opportunity of subscribing.

In Dec., 1938, the plaintiff launched this action, complaining of what happened in 1915 and asserting a right in himself in respect of that issue of shares. He asked in the first place for a declaration against Dr. Mond and Barr to the effect that they were trustees for him of the shares allotted to them in Sept., 1915, to the extent of the proportion which, under the memorandum, he would have been entitled to receive. Alternatively, he asked for a declaration that those defendants became trustees by virtue of a document mentioned in the statement of claim, to which I shall refer in a moment. Alternatively, as against the third defendant, the company, he asked for a declaration that the purported issue of those 2,500 shares was wholly void for want of compliance with cl. 5 (*a*) of the memorandum, and, as against the first and second defendants, he claimed damages for breach of trust.

I will look, in the first place, at the first declaration claimed. It is based upon the hypothesis that, shares issued to the first two defendants having been issued contrary to the terms of the memorandum of association, and in disregard, as it is said, of the plaintiff's rights, that

issue had the effect of constituting between the plaintiff and those two
defendants, as allottees of the shares, the relationship of *cestui que trust*
and trustee. There is, of course, no question of any express trust, and
the claim is based upon the theory that the relationship of the parties
and the other relevant circumstances of the case are sufficient to raise
an obligation of trusteeship in those defendants in respect of those shares. A
In my opinion, that is a theory for which there is no title of support.
The facts alleged (I will assume in the plaintiff's favour) show that, in
issuing those shares, the company issued them in a way which the
memorandum of association did not permit. I will assume in the
plaintiff's favour that the directors who were party to that issue in some B
way failed to perform their duty to the company. I will assume in
the plaintiff's favour that the allottees of those shares on that allotment
received more shares than those to which they were entitled under
the memorandum of association. Nevertheless, those circumstances are
not sufficient to constitute the relationship of trustee and *cestui que* C
trust. There is no implied trust obligation to be discovered in facts
of that sort. Under the assumption I have made, it may be—I express
no opinion upon it—that the plaintiff may have had a claim *ex contractu*
against the company. Conceivably—again, I say nothing about it—
he might have had some claim *ex contractu* against his fellow-shareholders D
who received the shares. Any such claim, however, would, of course,
at this date have been perfectly hopeless, because it would have been
a claim in contract, and the lapse of time would have been a complete
answer to it. The attempt to construct a trust obligation out of those
facts, without which the plaintiff would be hopelessly barred, is, in my E
opinion, one which fails completely. That deals with the first declaration.

The second declaration is based upon a document, dated Nov. 29,
1915, referred to in para. 7 of the statement of claim. It is stated to
have been a document signed by the 4 allottees of the 2,500 shares. It
recited that they were the directors of the defendant company, and by F
it they agreed to hold the shares and dividends upon them on trust,
to be dealt with as the majority of them or the survivors or the majority
of the survivors should from time to time determine, all of them admitting
that they had not nor were nor should have been entitled to any other
or further beneficial interest (if any) in such shares than as might be G
determined by them, and in the manner and at the time set out in the
document. That document quite clearly confers no rights whatever
upon the plaintiff. He is not mentioned in it, and the trust which is
constituted by it is a trust in which he has no part or concern.
Accordingly, the second alternative claim is, in my opinion, equally H
incapable of support.

The third claim is a claim expressed to be an alternative claim as
against the defendant company. It is a claim, as I have said, that the
issue of 2,500 shares was wholly void, and it is to be observed that no
substantive relief is claimed on the basis of that declaration, but, in

any event, it is not a declaration claimed against the first two defendants at all.

The fourth claim, which is one for damages for breach of trust, cannot be supported in view of what I have said with regard to the declarations.

The position, therefore, in my opinion, is that this statement of claim discloses as against the present appellant, Dr. Mond, no cause of action. I go further, and say that, in my opinion, having regard to the time which has elapsed since the matters complained of, this action is not one which can be treated as a serious action. In my judgment, it is a frivolous and vexatious one. On the facts as I have at present outlined them, in the circumstances of this case, Dr. Mond would, in my judgment, unquestionably be entitled to ask this court for an order striking out the statement of claim as against him and dismissing the action as against him. The notice of motion asking for that relief was duly served on the plaintiff's solicitors on the record. The present notice of appeal has been duly served on those solicitors, and, but for the circumstances which I am about to mention, there can be no question that, so far as procedure is concerned, the matter has been conducted with perfect regularity, and the circumstance that the plaintiff did not appear in court would be no reason for refusing the order to which the appellant is otherwise entitled.

The circumstance which might appear at first sight to raise some doubt—and, indeed, it was one which had to be carefully considered by the court—is the circumstance that the plaintiff became an enemy alien on the outbreak of the present war, and he so remains. Before the present war broke out, his writ had been issued and his statement of claim delivered, and defences to the action had been delivered, and, further, he had made certain admissions of fact. The outbreak of war had not had the result of removing from the record the name of the solicitors who were acting for the plaintiff, and, indeed, according to the rules and practice of the court, a solicitor who is once on the record remains on the record, notwithstanding that his retainer may be revoked. The only way by which his name can be got off the record is by appointing another solicitor in his place and by that solicitor being entered upon the record as the solicitor for the party in person. Therefore, according to the rules, the service upon that firm of solicitors was perfectly good and effective. Ought the circumstance that the present plaintiff is an alien enemy to affect the right of the appellant, who is a British subject, to obtain from this court the relief to which, as matters stand, he is, in my opinion, quite clearly entitled ? In other words, is he to be left under the disadvantage of having this action hanging over him for an indefinite period merely because the plaintiff is an enemy alien ? Putting it in still another way, is the plaintiff, because he is an enemy alien, to have the advantage, for what it is worth, of indefinitely holding an action over the head of a British subject, on the ground that, because he is an enemy alien, the ordinary procedure of the courts does not apply to him, or ought not to be allowed to apply to him, so that the service of the notice of motion upon him should be treated as in some way defective, or some discretion of the court ought to be exercised in his favour ? I can see no ground why such a privilege should be accorded to an enemy alien and why such a disadvantage should be imposed upon a British subject. The rules have been strictly complied with, and the circumstance that the plaintiff's solicitors on the record have not communicated with their client, and might well have difficulty in communicating with him, does not, upon the facts of this case, justify the court in withholding from the appellant the relief to which he is entitled, or in postponing a decision upon the application until such steps as may be possible to communicate with the plaintiff have been taken.

I make that last observation for this reason. It must not be supposed that, because an enemy alien plaintiff finds himself in a situation in which his statement of claim is attacked, as it is attacked in this case, the circumstance that he is an enemy alien necessarily in every case would mean that the court would make the order asked for, without some further inquiries as to the possibility of communicating with him. The solicitor on the record must not take it that he has performed his duty to his client by doing nothing in the matter. He might be able to take some steps himself, or he might leave the matter to the court, to give such directions to him, with a view to communicating, if possible, with his client, as the necessity of the case would appear to dictate in the interests of justice. No such steps, in my view, ought to be taken in the present case, for the reason that the action upon its face is quite unsustainable, and for the further reason that it is a hopelessly stale demand, dealing, as it does, with matters which the plaintiff could have litigated nearly 20 years ago, if he had been so disposed.

In those circumstances, the court ought not, in my opinion, to delay giving the appellant the relief to which he is entitled in order that some communication should be attempted with the enemy plaintiff. For those reasons, in my judgment, the appeal is entitled to succeed. The judge felt some hesitation, apparently, as to whether in any case an order should be made in view of the fact that the plaintiff was an enemy alien, but proceeded on the basis that the order could and would be made. Notwithstanding that circumstance, he thought that there was sufficient in the statement of claim to justify some consideration at the trial that the summary step of striking it out ought not to be taken. With all respect to him, I cannot find anything in the statement of claim which would justify a refusal to make the order. On the facts of this particular case, I have entertained no doubt that the order ought to be made, notwithstanding the enemy character of the plaintiff.

The appeal is by Dr. Mond alone, although the notice of motion on the face of it purported to be a notice of motion on behalf of all the defendants. They have, we are told, been represented by different solicitors, Dr. Mond by one firm of solicitors and Barr and the company by another firm of solicitors. The position of Barr and the company is one which is not affected, save as a matter of authority on the questions of law we have had to discuss, by the present order, which is an order affecting Dr. Mond alone. The order will be that the statement of claim as against Dr. Mond be struck out and the action as against him dismissed with costs.

SCOTT, L.J.: I agree.

CLAUSON, L.J.: I agree.

Order that the statement of claim as against the appellant be struck out and the action as against him dismissed with costs in both courts.

Solicitors: *H. C. Morris, Woolsey, Morris & Kennedy* (for the appellant); *Brash Wheeler, Chambers, Davies & Co.* (for the respondents other than the plaintiff).

[*Reported by* F. HONIG, *and* W. K. SCRIVENER, ESQS.,
Barristers-at-Law.]

R. *v.* WESTMINSTER ASSESSMENT COMMITTEE, *Ex parte* JUNIOR CARLTON CLUB (TRUSTEES).

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **May 22, 1940.**]

Rates and Rating—Assessment—Provisional list—Alteration in value—"Cause"—Valuation (Metropolis) Act, 1869 (c. 67), *s.* 47.

The trustees and committee of a London club applied for a reduction of the assessment of the club to rates on account of the reduction in the revenue of the club due to the lighting and petrol restrictions and general dislocation consequent on the war:—

HELD: these were matters which affected not only the club property, but property generally, and were not a "cause" within the meaning of that word in the Valuation (Metropolis) Act, 1869, s. 47.

[**EDITORIAL NOTE.** The only question here is the construction of the words of the section, and it is held that the restrictions were too general in their application to be within the section. It would seem that to come within the section the cause must be one applying particularly to the property being assessed.

AS TO PROVISIONAL LIST, see HALSBURY, Hailsham Edn., Vol. 27, pp. 550-552, paras. 1010, 1011; and FOR CASES, see DIGEST, Vol. 38, pp. 641-643, Nos. 1592-1612.]

Cases referred to:

(1) *R.* v. *Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176; 16 Digest 287, *1003*; 88 L.J.K.B. 553; 120 L.T. 177.

(2) *R.* v. *Westminster Assessment Committee, Ex p. London & Provincial Victuallers, Ltd., R.* v. *Islington Assessment Committee, Ex p. Royal Agricultural Hall Co.*, [1917] 2 K.B. 215; 16 Digest 347, *1740*; 86 L.J.K.B. 1161; 116 L.T. 641; *affd. sub nom. Royal Agricultural Hall Co.* v. *Islington Assessment Committee,* [1918] A.C. 525.

(3) *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan,* [1910] 2 K.B. 859; 16 Digest 105, *49*; 80 L.J.K.B. 185; 103 L.T. 262.

Motion for an order of *mandamus* directed to the Westminster Assessment Committee to order the committee to hear and determine according to law an objection made by or on behalf of the applicants to a provisional valuation list made by the rating authority for the city of Westminster on or about Oct. 28, 1939, and for an order of *certiorari* directed to the Westminster Assessment Committee to bring up and quash an order of that committee made on Nov. 29, 1939, that the entry relating to that hereditament should be struck out of the provisional valuation list. The premises of the applicants were rated in the existing list at £10,800 gross and £8,997 net. A proposal was made that these figures should be reduced to £7,200 gross and £6,093 net. The ground for the proposed reduction was that the revenue of the club had been so reduced by reason of restrictions due to the war that the rateable value ought to be correspondingly reduced. The particular restrictions mentioned were those affecting lighting and petrol, and the general dislocation had, it was claimed, affected the attendance of members.

The assessment committee decided that the fall in receipts was one of the general consequences of the war, such as the evacuation of commercial houses and members of the public, mobilisation of the Forces and the general financial stringency and economic depression. The committee took the view that these matters affected, not only this club, but also all other property. For these reasons, they decided that there was not a cause or causes within the meaning of the Valuation (Metropolis) Act, 1869, s. 47. This section provides as follows:

> If . . . the value of any hereditament is . . . from any cause increased or reduced in value, the following provisions shall have effect . . .

N. L. C. Macaskie, K.C., and *Michael E. Rowe* for the applicants.

R. M. Montgomery, K.C., and *Ralph H. Etherton* (for *Arthur Capewell* on war service) for the respondents.

Lord Hewart, L.C.J.: The facts of this case are clearly stated in the affidavits, and have been clearly stated also in the argument of counsel for the applicants. I need not reiterate the facts which are set out. The point of the matter is that it is alleged that the case comes under the Valuation (Metropolis) Act, 1869, s. 47, and that there was here a case, not of increase, but of reduction, in value for reasons which are assigned.

In the course of his argument, counsel for the applicants referred to various cases, in particular to *R.* v. *Port of London Authority, Ex p. Kynoch, Ltd.* (1), *R.* v. *Islington Assessment Committee, Ex p. Royal Agricultural Hall Co.* (2) and *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* (3), but the whole point of the argument was that it was said that in this case there had been a refusal on the part of the assessment committee to look at the facts. It was said that the committee had closed their eyes to relevant facts. When one looks at the materials stated in the very clear affidavit filed on behalf of the committee, it seems to me that it is a very difficult proposition to maintain. Para. 14 of that affidavit states as follows :

> The committee came to the following conclusions—that the fall in receipts was due to the general consequences of the war, such as . . .

A Then various examples are set out. In other words, the cause was not such an individual matter as to give rise to a reduction. The cause was general. In the strict sense of the term, it was not local, but it was universal. The assessment committee came to the conclusion that the fall in receipts was due to the general consequences of the war. I think B that that was a right conclusion, and, although I have listened with care to the argument of counsel for the applicants, I have heard nothing to make me take the opposite view. I think, therefore, that this motion fails.

C CHARLES, J. : I agree, and I have nothing to add.

HUMPHREYS, J. : I also agree, and have nothing to add.

Application dismissed with costs.

Solicitors : *Norton, Rose, Greenwell & Co.* (for the applicants) ; *Allen & Son* (for the respondents).

D [*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WEAVER *v.* TREDEGAR IRON AND COAL CO., LTD.

E [HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **April 9, 10, 11, May 30, 1940.**]

Workmen's Compensation—Course of the employment—Termination—Accident on way from work—Private halt owned by railway but completely enclosed by colliery premises—Collier injured while boarding train—No duty or obligation to use train—Workmen's Compensation Act, 1925 (c. 84), *s.* 1 (1).

F A collier was caught up in a press of fellow-workmen trying to board a train and was pushed off the railway platform and injured. The platform and train were both owned, managed and controlled by a railway company, but the platform was situated by the side of a railway line which ran through the colliery premises owned by the workmen's employers, and was accessible from the colliery premises only. G It was not open to the public, and its name did not appear in the company's time-table. Employees of the colliery used it under an arrangement between their employers and the company whereby specified trains were stopped at the platform to take the men to and from their homes at a reduced fare, which was deducted by the employers from the men's wages. The men were free to go home by means of the main road which ran past the colliery, but in practice H nearly every employee used the railway. The injured workman claimed compensation :—

HELD (VISCOUNT MAUGHAM *dissenting*) : as the workman was making use of facilities provided by his employers for leaving the place of employment, which he had not left at the time of the accident, and as the duty to leave the employment in a permitted manner had not been completed, the accident arose in the course of and out of the employment, and he was entitled to compensation.

[**EDITORIAL NOTE.** One of the most difficult problems to which the Workmen's Compensation Acts have given rise is that of determining when a workman's employment commences and when it ends. As a rule, it does not commence until the workman has reached his place of employment, and it does not continue after he has left that place, the periods of going to and returning from the place being generally excluded. This, however, is not an invariable rule, and the employment does not necessarily end when the "down tools" signal is given, or when the workman leaves the actual workshop where he is working. There may be some reasonable extension both in time and space, as, for instance, where the workman travels to and from his work by some form of transport provided by his employers, and which he is under a contractual duty to use, or where he is using the means of access to and egress from his place of employment. The Court of Appeal felt themselves bound in this case by the decisions of the House of Lords in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) and *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5) to decide against the workman, but the majority of the House are of the opinion that, on the facts, the workman had not, at the time of the accident, left his employment, that he was about to leave the employment in the manner provided by the employers, and that, until he was on the train, the course of his employment was still running. Viscount Maugham, in a dissenting judgment, finds himself unable to distinguish between the duty, if any, of the workman to his employers when he was standing on the platform or trying to get into the train from his duty as it would have been after he had entered the train, and is of the opinion that the case is covered by *Hewitson's* case (1).

As to Course of Employment, see HALSBURY, Hailsham Edn., Vol. 34, pp. 825-827, para. 1164; and for Cases, see DIGEST, Vol. 34, pp. 279-282, Nos. 2358-2371. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 24-35.]

Cases referred to:

(1) *St. Helens Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59; 34 Digest 280, *2364*; 93 L.J.K.B. 177; 130 L.T. 291; 16 B.W.C.C. 230.

(2) *Cremins* v. *Guest, Keen & Nettlefolds, Ltd.*, [1908] 1 K.B. 469; 34 Digest 280, *2361*; 77 L.J.K.B. 326; 98 L.T. 335; 1 B.W.C.C. 160.

(3) *Parker* v. *Black Rock (Owners)*, [1915] A.C. 725; 34 Digest 295, *2456*; 83 L.J.K.B. 1373; 113 L.T. 515; 8 B.W.C.C. 327.

(4) *Armstrong, Whitworth & Co.* v. *Redford*, [1920] A.C. 757; 34 Digest 314, *2579*; 89 L.J.K.B. 495; 123 L.T. 114; 13 B.W.C.C. 68; *affg.*, 88 L.J.K.B. 850.

(5) *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (1926), 19 B.W.C.C. 119; 34 Digest 281, *2366*; 135 L.T. 386.

(6) *London & North Eastern Ry. Co.* v. *Brentnall*, [1933] A.C. 489; Digest Supp.; 102 L.J.K.B. 438; 148 L.T. 530; 26 B.W.C.C. 225.

(7) *Stewart (John) & Son (1912), Ltd.* v. *Longhurst*, [1917] A.C. 249; 34 Digest 279, *2357*; 86 L.J.K.B. 729; 116 L.T. 763; 10 B.W.C.C. 266; *affg.*, [1916] 2 K.B. 803.

(8) *Davidson (Charles R.) & Co.* v. *M'Robb or Officer*, [1918] A.C. 304; 34 Digest 276, *2339*; 87 L.J.P.C. 58; 118 L.T. 451; 10 B.W.C.C. 673; *revsg.* S.C. *sub nom. Officer* v. *Davidson (Charles R.) & Co.* (1917), 10 B.W.C.C. 480.

(9) *Webber* v. *Wansborough Paper Co., Ltd.*, [1915] A.C. 51; 34 Digest 279, *2356*; 84 L.J.K.B. 127; 111 L.T. 658; 7 B.W.C.C. 795.

(10) *Sparey* v. *Bath Rural District Council* (1931), 146 L.T. 285; Digest Supp.; 24 B.W.C.C. 414.

(11) *Cook* v. *Montreal (Owners)* (1913), 108 L.T. 164; 34 Digest 279, *2355*; 6 B.W.C.C. 220.

(12) *Northumbrian Shipping Co., Ltd.* v. *McCullum* (1932), 101 L.J.K.B 664; Digest Supp.; 147 L.T. 361; 23 B.W.C.C. 284.

(13) *Foster* v. *Edwin Penfold & Co., Ltd.* (1934), 27 B.W.C.C. 240; Digest Supp.

(14) *Richards* v. *Morris*, [1915] 1 K.B. 221; 34 Digest 282, *2370*; 84 L.J.K.B. 621; 110 L.T. 496; 7 B.W.C.C. 130.

(15) *Cross, Tetley & Co., Ltd.* v. *Catterall* (1905), [1926] 1 K.B. 488, n.; 34 Digest 278, *2353*; 134 L.T. 135, n.; 18 B.W.C.C. 445, n.

(16) *Walton* v. *Tredegar Iron & Coal Co.* (1913), 6 B.W.C.C. 592; 34 Digest
A 280, *2362*.

(17) *Holness* v. *Mackay & Davis*, [1899] 2 Q.B. 319; 34 Digest 278, *2352*; 68 L.J.Q.B. 724; 80 L.T. 831; 1 W.C.C. 13.

(18) *Howells* v. *Powell Duffryn Steam Coal Co.*, [1926] 1 K.B. 472; 34 Digest 280, *2360*; 95 L.J.K.B. 654; 134 L.T. 129; 18 B.W.C.C. 427.

B APPEAL by the workman from an order of the Court of Appeal, dated Apr. 26, 1939, affirming an award made by His Honour JUDGE L. C. THOMAS, dated Dec. 13, 1938, in favour of the respondents. The facts and the arguments are fully set out in the opinions of their Lordships.

Gilbert J. Paull, K.C., and *A. Arthur Warren* for the appellant.

C *F. W. Beney* and *Griffith Williams* for the respondents.

VISCOUNT MAUGHAM: My Lords, the appellant was employed by the respondents at their Pochin Colliery as a collier's helper. On Mar. 3, 1938, he was unfortunate enough to suffer very serious personal injury
D by reason of an accident which happened after his day's work was done, whilst he was on his way home. The question is the well-known one whether the accident arose out of and in the course of his employment.

The admitted facts are these. The colliery premises are partly on one side and partly on the other of the London, Midland and Scottish
E railway from Newport to Tredegar. There is a halt known as Pochin Halt, consisting of two platforms, one on each side of the railway track, and means of access thereto. These premises are the property of the railway company, and are maintained by them, but the halt is used only by persons and workmen employed by the respondents. The
F public have no right of access to the platforms, and the times at which trains stop at them are not shown on the railway time-table. Moreover, there are no means of access to the platforms except along the lines or over the respondents' premises. There is no ticket-office at the halt, and tickets are obtained by men who desire to use the trains from an
G office of the respondents at the cost of 1*d.* per day return fare to Tredegar. The respondents make arrangements with the railway company with regard to the provision of trains stopping at the halt and to the payment for these trains, which, however, are owned, driven and managed by the railway company's servants. There remains to
H be stated one important agreed fact, which is as follows:

> No contractual obligation or duty is placed upon the respondents' workmen to use the train. There are other means of travelling to colliery, e.g., by bus, walking or cycling, open to men working at Pochin and means of access to colliery from main road. In fact practically all the workmen travel by train.

On Mar. 3, the platform at the halt was crowded, as the men were waiting to get into the train from the platform. The appellant was pushed off the platform as the train was coming in, with the result that his left arm got caught between two railway coaches. The arm had to be amputated above the elbow, with the consequence of total incapacity. If sympathy for such a disaster to the appellant were admissible to affect our decision, our task would be easier, but it is not, and, in my opinion, there are authorities of this House which lead to the inevitable conclusion that the accident did not arise in the course of the appellant's employment. That was the view adopted by the experienced county court judge and by the three judges in the Court of Appeal, Clauson and Luxmoore, L.JJ., and Macnaghten, J., and I think that it is my duty to state my agreement with them and to explain my reasons.

I will begin with *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1), which, in my view, finally decided the test to be applied in cases where the workman sustains an accident in coming to or leaving the place of his employment. The workman in that case, being a man employed at a colliery, was injured in a railway accident while travelling in a special colliers' train from his work to his home at Maryport, but he was not bound to use the train. Lord Buckmaster, who delivered the leading opinion, stated the position with his usual clearness and force. He agreed with the county court judge that it was an implied term of the contract of service that the train should be provided by the employers. He went on to say, at p. 66:

> It was as a workman entering the service of the employers that he obtained a pass enabling him to travel and released his rights against the railway company. It was, I think, an inseparable part of his contract of employment. It does not, however, seem to me that this conclusion determines the case in his favour. He had undoubtedly the right to travel by the train—the right enjoyed by him as a miner in the service of the appellants; but he was not directed to travel by such a train; had he found it convenient or desirable he could have travelled by other means.

He then referred to *Cremins* v. *Guest, Keen & Nettlefolds, Ltd.* (2), where the Court of Appeal had decided that the phrase "in the course of his employment" was satisfied if the workman was in the place where the accident occurred by reason of an implied term of the contract of service that he should have the right, if not the obligation, to use the train. He rejected this test, and decided that the words of the well-known phrase could not be construed as including in their operation an accident to a workman travelling by a train which he was under no obligation and no proved necessity to use. Lord Atkinson agreed, in an elaborate opinion in which he went through the previous decisions. He laid down the true test as being whether the workman was at the time and place where the accident occurred doing something in performance of a duty to the employer arising out of the contract of employment, bearing in mind that the word "employment" in such a case was used to cover and include things belonging to or arising out of it. He founded himself largely upon the decision of the majority of this House in *Parker* v. *Black Rock (Owners)* (3), at pp. 728, 729, 731, 732, 733. He held that the decision as to the right test was not in any way qualified or weakened by the decision in *Armstrong, Whitworth & Co.* v. *Redford* (4). LORD SHAW dissented in a vigorous opinion, holding in effect that it was sufficient for the workman to prove that the accident occurred at a place where, by virtue of his contract of employment, he had the right to be, since this was incidental to his employment. LORD WRENBURY agreed with the majority. He said, among other things, that he was content to deal with the case as if the train were [p. 96]:

> . . . a special train for which the employers paid, and in which the workman was, by virtue of a term in his contract of service, at liberty to travel if he wished to do so. These facts do not to my mind indicate in any way that the workman was in the employment at the time. . . . There was in this no obligation, and there arose in the workman no duty.

He stated expressly what some of the other opinions only implied—namely, that *Cremins* v. *Guest, Keen & Nettlefolds, Ltd.* (2) was wrongly decided. LORD CARSON concurred shortly, and, as I read his opinion, on the same ground. The headnote states that *Cremins*' case (2) was overruled, and, for myself, I cannot see any room for doubt on this point.

That the principle of *Hewitson's* case (1) is not limited to cases where the workman is in actual occupation of means of transport provided by the employer—e.g., a train or omnibus—is, I think, clearly established by the decision of this House in *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5). In that case, the employers, by agreement with the Great Western Railway Co., provided trains by which the men could travel to the colliery. The coaches and the platform were owned by the employers. The men were expected to travel by the provided trains, but not bound to do so. An employee on his way to work was going to such a train at about 5.35 a.m., and to do so he had to cross the line. He was knocked down by a light engine, and suffered serious injury. The county court judge found that the man [p. 120]:

> . . . when crossing the line to the train, was in the act of using the only reasonable and practical means of access open to him when he met with the accident.

The award, therefore, was in his favour. Notwithstanding this finding, the Court of Appeal and this House decided, on the authority of *Hewitson's* case (1), that there was *no duty or proved necessity for the applicant to travel to his work by the train provided*, and that the accident, therefore, did not arise out of and in the course of his employment. In this House, LORD CAVE, L.C., and LORD SUMNER delivered opinions of some length, and LORD PHILLIMORE, LORD CARSON and LORD BLANESBURGH concurred. LORD CAVE stated the test as being this, at p. 387:

> Was it the duty of this man—his duty to his employers under his contract of service—to go to this platform and to travel by this train?

He took this as being the test from the decision in *Hewitson's* case (1), and he added that, where a broad principle had been decided by this House, it seemed to him to be very undesirable that it should be frittered away by fine distinctions. He said plainly that there was no real distinction between *Hewitson's* case (1) and the case then before the House, and he plainly saw no distinction between getting to the platform and travelling by the train. LORD SUMNER was equally clear and definite. He began by saying that the decision of the House in *Hewitson's* case (1) showed quite clearly that in such a case it was essential for A the workman to show that he was under a contractual obligation to travel by the train. He stated that that principle was binding on the House, and must be followed. In my opinion, none of the Lords who took part in the decision can have thought that there was any distinction for the purposes of the Act between the position of a workman B on his way over a railway line to catch a provided train and that of such a man when actually in the train, or on the platform waiting for it.

The same principle was applied in this House in *London & North Eastern Ry. Co.* v. *Brentnall* (6), only in that case the decision was in favour of the employee. I only mention it because it shows, as clearly C as *Newton's* case (5), that the principle is not applied only in cases where the employee is actually travelling in a train or other vehicle. It was the case of an engine-driver who was under an obligation, in the intervals between his journeys, to go and stay at a hostel which had been provided by the railway company at Sheffield for the use of their men. The D vital point was that the man had to take eight hours' rest at the hostel, though, subject to that, he could do as he pleased. He went to the hostel, slipped on his way to the lavatory, and injured himself. The question, of course, was whether the accident arose out of and in the course of his employment. LORD BUCKMASTER delivered the only opinion with E reasons. LORD WARRINGTON, LORD TOMLIN, LORD RUSSELL and LORD WRIGHT were content to concur. LORD BUCKMASTER based his opinion largely upon *Hewitson's* case (1). He observed—and plainly with approval—that in that case LORD WRENBURY [p. 493]:

> . . . made quite clear that there was all the difference between the thing which F a man, by virtue of his contract of service, had the right to do and that which, by virtue of his contract of service, he was compelled to do.

He shortly stated the facts in *Hewitson's* case (1), and then added, at p. 493:

> I find it very difficult indeed to distinguish between the case where a man is G compelled to take a particular means of going to his work, and a case where a man is compelled to go to a particular place where he has to rest between the different spells of his work, and I cannot help thinking that, if authority were required, *Hewitson's* case (1) is abundant for the purpose.

This accepts the same test of "nexus of duty" as was established in *Hewitson's* case (1), though no travel by train or vehicle provided by H the employers was involved.

My Lords, with the greatest respect to those who think differently, I am not sufficiently ingenious to distinguish between the duty, if any, of the appellant to the respondents when he was standing on the platform or trying to get into the train and his duty as it would have been after he had entered the train at the halt. In both cases he was under no control by the respondents, nor bound in any way to wait for the train or to use it. He was where he was in either case in consequence of his employment, but I do not think that it was in its course that the accident occurred. In using these phrases, I am merely adopting the words used by LORD BUCKMASTER in *Hewitson's* case (1), at p. 67. The principle there laid down, and shown by the two subsequent decisions of this House to extend beyond the circumstance of actual travel in some provided train or other means of conveyance, is, in my opinion, binding upon us, and, like the county court judge and the Court of Appeal, I find myself unable to escape from the conclusion that it covers the present case. The noble Lords who took part in the three cases I have cited were well-acquainted with the cases relating to accidents on quays or the sides of docks, beginning in this House with *Stewart (John) & Son (1912), Ltd.* v. *Longhurst* (7). LORD BUCKMASTER and LORD ATKINSON took part in that case, as they did in *Hewitson's* case (1). I will not take up your Lordships' time by going through the various dock cases, not one of which, so far as this House is concerned, is inconsistent with the test of duty as being that which should be applied in determining whether an accident has arisen in the course of the employment. It may, however, be mentioned that *Davidson (Charles R.) & Co.* v. *M'Robb or Officer* (8) was decided mainly on the application of that test: see *Armstrong, Whitworth & Co.* v. *Redford* (4). For the above reasons, I am, for my part, in favour of dismissing this appeal.

LORD ATKIN: My Lords, this is an appeal from the Court of Appeal affirming a decision of His Honour JUDGE THOMAS at the Tredegar County Court, who had made his award in favour of the employers in proceedings under the Workmen's Compensation Act, 1925. Once again this House has to consider the question whether injury by accident suffered by a workman arose "in the course of his employment." Various attempts have been made to formulate a universal test by application of which the course of employment could be ascertained, but, on analysis, they will generally be found not to cover the whole field. A man, it is suggested, is no longer in the course of his employment when he has left his employer's premises. However, as has been often pointed out, workmen are constantly employed on premises which are not their master's—for instance, most men engaged in the building trade and kindred operations, and from time to time men engaged in engineering work, ship repairs, highway repairs and the like. *Webber* v. *Wansborough Paper Co., Ltd.* (9) and *Stewart (John) & Son (1912), Ltd.* v. *Longhurst* (7) are cases where the injured workman who was awarded compensation was not on his employer's premises, and was not even on the premises (the ship) on which he was employed to work. Another test is "duty." Is he doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service? As was said by **Lord Atkinson** in *Hewitson's* case (1), at p. 71:

> The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment" as here used covers and includes things belonging to or arising out of it. A

As was said by **Lord Cave** in *Newton's* case (5), at p. 387:

> . . . there is no doubt that the test of duty formulated by **Lord Atkinson** is the accepted basis on which these questions ought to be dealt with.

Be it so. Nevertheless, the word "duty" in the test has such a wide connotation that it gives little assistance as a practical guide. Employ- B
ment, says the formula, "covers and includes things belonging to or arising out of it." We are still left to discover what those things are. It is well-settled that a man injured while taking refreshment on the premises at a permitted hour, or while otherwise relieving necessities of nature, is in the course of his employment. It is a wide use of language C
that permits one to say that in those cases "he is doing something in discharge of a duty to his employer imposed upon him by his contract of service," even if you add the words "directly or indirectly." Moreover, I find it difficult to take seriously the notion suggested by one noble and learned Lord that in doing such things the workman is doing D
them so that he may better perform the work he is employed by his employer to do.

Duty with the vague connotation given to it above cannot be rejected, but it does not seem to point very clearly to the desired goal. There can be no doubt that the course of employment cannot be limited to the E
time or place of the specific work which the workman is employed to do. It does not necessarily end when the "down tools" signal is given, or when the actual workshop where he is working is left. In other words, the employment may run on its course by its own momentum beyond the actual stopping-place. There may be some reasonable extension in F
both time and space, as I pointed out in *Sparey* v. *Bath Rural District Council* (10), at p. 287. What the nature of these extensions may be is a matter on which we have assistance from several decisions of this House. In *Webber* v. *Wansborough Paper Co., Ltd.* (9), the workman, who was a seaman employed upon a ketch, having finished his work on G
the ship for the day, was going off duty, passed from the deck to the wharf by a plank which rested on a fixed iron ladder attached to the wall of the quay, and was climbing the ladder when he fell and was injured. **Lord Haldane** says, at p. 55:

> . . . the law being as **Buckley**, L.J., points out in the case of *Cook* v. *Montreal (Owners)* (11), that "in the obligations contractually existing between master and H
> servant it is part of the duty of the master to afford the workman when he is dismissed reasonable facilities for leaving the place of employment, and that if the servant is injured whilst availing himself of those facilities the master may be liable,"—the conclusion in this case seems to me to be a very simple one.

It is desirable to emphasise that the facility afforded by the master was passage over a ladder, which belonged to the harbour authorities at Watchet, where the ship was moored. Thus, in *Stewart (John) & Son (1912), Ltd.* v. *Longhurst* (7), a carpenter, employed in repairing a barge lying in dock, after finishing his day's work left the barge, and, while walking in the dark along the quay, fell off the quay and was A drowned. The dock was private property, but the man's employers and their workmen had leave to pass through the dock on their way to or from the barge. His widow was held entitled to compensation. LORD FINLAY, L.C., said, at p. 253 :

> The present case belongs to a class of cases where the thing on which the workman B is employed is lying in a dock or other open space to which he obtains access only for the purposes of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and he *may* be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract as necessarily incidental to it.

C Thus, LORD DUNEDIN, at p. 257, cites with approval the words of PICKFORD, L.J., in the Court of Appeal :

> The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers D which he would not have encountered but for that employment.

It must be noted that here again the workman had finished his time, had left the place where he was working, and was at a place which did not belong to, and was not controlled by, his employers, and over which they had a mere licence for themselves and their workmen. I need only E refer to the similar case of *Northumbrian Shipping Co., Ltd.* v. *McCullum* (12), in which LORD MACMILLAN, in giving an opinion in which all the other Lords concurred, said, at p. 671 :

> The seaman who on his way back to the ship has left the public highway with its risks common to all wayfarers, and has entered the private premises of the F harbour in which his ship lies with its special risks to which only those who have business at the harbour are exposed, seems to me to have come within the protection of the Act, for if he sustains an accident while using this access he sustains it by reason of risks incidental to his employment, which he would not have encountered but for his employment.

In argument, it was suggested that in these cases the access provided G was the only access available, and stress was laid upon the words of PICKFORD, L.J., in the passage cited, and to words in a previous passage in the opinion of LORD MACMILLAN, at p. 670 :

> If in going to or coming from his work he has to use an access which is part of his employers' premises . . .

H I do not think that any of the learned persons using or approving those words intended to confine this principle to cases where the only access is over third persons' properties. It is well-established that the workman, while leaving his employer's premises by one of alternative routes, is—at any rate, while on the premises—in the course of the employment, and it would surely be remarkable that, if, at the end of one of those permitted routes, the employers had provided by licence from third parties a route over such third parties' land for the very object of making the permitted route on the employer's premises an effective means of entrance or egress, the course of employment ceased on the employer's boundary, and the doctrine of the cases cited ceased to apply. If, in the ship cases, the vessel lay in a basin between two quays, would the course of employment have ceased if the seaman used one of two, whereas it continued if he used only one? It happens that this question arose and was decided in *Foster* v. *Edwin Penfold & Co., Ltd.* (13), a case which came before the Court of Appeal in 1934. In that case, the workman had parked his car at the back of his employers' premises on a wharf which his employers and their workmen were entitled to use. He was drowned in consequence of driving his car against a bollard on the wharf while leaving work by night. ROMER, L.J., said, at p. 259:

> What he [the county court judge] has found is that the deceased employee was not bound after his work had ended to go home by his car. Neither SLESSER, L.J., nor myself desire to intimate in any way that he was so bound to go home by his car. He was, however, bound as part of his service to leave the employers' premises, and he was entitled to leave them by any permissible way and in any permissible manner. He was leaving them by a permissible way and in a permissible manner, and the accident occurred before he had finally got free from those premises and was in a public place, that is to say, on the public highway.

I respectfully entirely agree with the way in which this is put, and I think that the decision is right, and should be affirmed. In that case, the majority of the Court of the Appeal treated the passage over the wharf as being equivalent to a passage over the employers' premises. To avoid controversy as to "employers' premises," the difficult application of which term I have already mentioned, I should myself prefer some such phrase as "the area [or the immediate area] of the employment."

When all the cases have been looked at and considered, one is finally brought back to the words of the Act, "the course of the employment." The course of the employment begins when the workman enters the employment, and it ceases when he leaves the employment, it being his duty to do both. "Going to" and "going from" the employment are not, I think, words which sufficiently accurately express the beginning and the ending of the employment in the sense which must be given to it in the light of the decided cases.

The application of what has been said above to the facts of the present case seems to me simple. The colliery employ numbers of men who work in shifts. A workmen's shift had come to an end in the afternoon, and the new shift had to take their places. It was the duty of the workmen in the old shift to leave their employment for the day, and it was essential, in the interests of the employers, to facilitate this process. The pit lay near a road by which the workmen could walk or bicycle to their homes, but it also abutted on a branch of the London, Midland and Scottish railway running between Newport and Tredegar. There was no regular station, but, for the accommodation of the employers

and their men, the railway company had made platforms on either side of the line, and ran a train each way at the time of the change of shifts. to bring in the new men and take away the old. Access to the platform was permitted to the employers' servants alone. The platform abutted on the employers' premises. It was approached by a bridge over the railway
A which belonged to the employers, from which steps which belonged to the railway company led down to the platform. Practically all the workmen travelled by the train. The employers made arrangements with the railway company for the provision of, and payment for, the train, and issued to each workman using the train what appears to be
B a daily return ticket, for which the workman had deducted from his wages 1*d.* per day. The injured workman, his work in the pit being over, proceeded to the platform to enter the train, and, in the crush of his fellow-workmen on the crowded platform to enter the train, he was pushed off as the train was coming in, and lost his arm. On these facts,
C it seems evident that the workman was making use of facilities which the employers had provided for leaving the place of employment (see *Webber's* case (9)), and for this purpose was upon premises which his employers, for the purposes of the employment, had obtained for him a licence to use, and on which he had no right to be and no reason for
D being except by the conditions of his employment: *Stewart* (*John*) *&* *Son* (*1912*), *Ltd.* v. *Longhurst* (7). He had not left his employment. He was about to leave the employment in the manner provided by the employers, but, until he was on the train, the employment was not left. The course was still running. The county court judge and the Court
E of Appeal considered themselves bound by the decisions in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) and *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5). Those cases, with great respect, are of a different kind from this. In the former case, a workman was travelling in a special train provided by the railway company by arrangement with the colliery
F company. He was travelling from his work, and the train ran off the line after it had proceeded some distance from the colliery station. It was plain that the course of his employment at the colliery had ceased. The man was on his way home. The journey on the train could be brought back into the employment only by showing that it was part
G of the contract of employment that the workman should travel by the train, so that his employment would continue until he left the train. It was held that, as there was no such term of the employment, inasmuch as the workman could travel by the train or not, the course of employment did not continue during the train's journey. In that case, the
H man had clearly left the employment when he started on the train. In the present case, as clearly he had not. He was on the platform with the intention of leaving, but was prevented by the accident. *Newton's* case (5) is still clearer. The workman was crossing the railway line in order to catch a special train proceeding to the colliery, and was knocked over by a light engine before he got to the train. The spot was about

3 miles from the colliery. Though it had to be admitted that there was no express term of the contract of employment requiring the applicant to use the train, he relied upon a finding of the county court judge that the only practicable and reasonable means of access to the colliery was the train. This finding was rejected by this House, on the ground that there was no evidence to support it, and with its disappearance disappeared any foundation for making the train journey part of the course of employment. The conception of duty is rightly emphasised there, for, unless there was a duty to use the train, it was plain that the ordinary course of employment had, in the one case, ceased, and, in the other, never begun. In the present case, the duty to leave the employment in a permitted manner had not been completed. If the accident arose in the course of the employment, it was not, and could not have been, disputed that it arose out of the employment. The crowd of fellow-workmen hustling into the train created a peril which appears to have been certainly caused by the employment.

It is evident, I think, that the county court judge and the Court of Appeal came to their decisions because they felt themselves bound by *Hewitson's* case (1) and *Newton's* case (5). The facts are not in dispute, and, in my opinion, admit of only one conclusion. The appeal should be allowed, the award set aside and the case remitted to the county court judge to award compensation. The appellant should have the costs here and in the courts below.

LORD WRIGHT: My Lords, this appeal raises the ever-recurring problem of the true construction, or rather the true application to the facts of the case, of the words of the Workmen's Compensation Act, 1925, s. 1, " accident arising out of and in the course of the employment." The particular aspect of the words here in question is not the causal, but the time, element: " the course of the employment." It is when, in the facts of this case, the employment terminated.

It has long been held that the course of the employment is not determined by the time at which a man is actually occupied on his work. There may be intermissions during the working-hours when he is not actually working, as, for instance, times for meals or refreshment, or absences for personal necessities. Moreover, the course of the employment may begin or end some little time before or after he has downed tools or ceased actual work. The simplest case is when a man in a large factory or works has to go a substantial distance before he leaves his employer's premises and goes into the public street. As LORD DUNEDIN said in *Stewart (John) & Son (1912), Ltd.* v. *Longhurst* (7), at p. 256:

> No one, for instance, would doubt that if a collier was injured in the cage on his way to the face at which he was to work that the injury arose in the course of his employment, though the face might be a mile away from the pit bottom; nor would anyone doubt that if the same man were starting from his house in the village and was injured while in the street before he approached the precincts of the colliery the opposite result would be arrived at.

Here LORD DUNEDIN is distinguishing between risks which a man incurs as an employee and those which he incurs as an ordinary member of the public. To the same effect, LORD ATKINSON said, at p. 258:

> In argument some distinction was attempted to be drawn between the case where the workman has to traverse the private property of the employer to get A to his work, and that where to do so he has to traverse the private property of another with the consent of that other. I do not think that is a sound distinction. When a man walks along the public streets to get to his work he is doing something which he has a perfect right to do irrespective altogether of his employment. The right does not spring from his employment at all. It belongs to him as a member of the public.

There LORD ATKINSON is drawing the same distinction as LORD DUNEDIN. B I find in these expressions, of which other instances may be found in the authorities, a general criterion for deciding when the employment begins and ends. In *Stewart's* case (7), the man was employed on a barge which was in a dock. To reach it, he had to traverse the premises of the dock company, over which his employer had no control, but had C secured permission for the man to pass from and to his work. He was injured while doing so, in consequence of a risk attaching to those premises. It was held that the accident arose out of and in the course of his employment. LORD DUNEDIN, at p. 257, quoted with approval the words of PICKFORD, L.J.: D

> The workman in this case in order to get to the actual place of work, had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment.

I have quoted these passages from *Stewart's* case (7) because they seem E to me to be precisely applicable to this case, save in one respect, which does not seem to me to constitute a distinction. In *Stewart's* case (7), the workman could not get to the barge save by crossing the dock premises. In the present case, Weaver could have left the colliery without resorting to the platform. In fact, however, "practically all F the workmen used it." It is the employers' duty to provide means of access to and egress from the work. Both access and egress are in this respect on the same footing. In *Parker* v. *Black Rock* (*Owners*) (3), at p. 730, LORD PARKER, while holding against the man's claim, was willing to concede that the arbitrator might have found that the quay G which the deceased seaman was using to regain his vessel was the proper and usual method of regaining the ship, and thus might be considered as the access to the ship, so that an accident happening during the course of using that access might be, within the cases, an accident in the course of the employment. That is not an express decision, but indicates H that it may be enough if the access was proper and usual. There are several decisions of this House which recognise that there may be a sort of notional extension of the employer's premises (or, more correctly, of the place where the employer is carrying on the particular work, which may include a place such as the barge in *Stewart's* case (7), or the spot on the highway in *Sparey* v. *Bath Rural District Council* (10)) so as to include an area which the workmen pass and repass in going to and leaving the actual place of work.

It is, I think, true to say that, in the various authorities, at least in this House, where this notional extension has been recognised, the actual or assumed state of things has been that there was no alternative way of access or departure. In one of the latest of these authorities A (which have all been cited at great length, and which I need not discuss in detail), it was said in *Northumbrian Shipping Co., Ltd.* v. *McCullum* (12) by my noble and learned friend Lord Macmillan in an opinion concurred in by the other Lords, at p. 670 :

B

> If in going and coming from his work he has to use an access which is part of his employer's premises, or which he is only entitled to traverse because he is going to or coming from his work, he is held to be on his master's business while he is using that access.

There Lord Macmillan uses the word "has," meaning, I presume, that it was the only access. That was so in the facts of that case, but C does the fact that there is an alternative access exclude the same result, assuming that the access is proper and usual, and is provided by the employers ? The words of the Act are very general, no doubt designedly so. Experience has shown how infinitely various may be the facts to which the words are to be applied. In *Stewart's* case (7), Lord D Buckmaster uttered a warning against the mistake involved in attempting to define a fixed boundary between the cases which are within the statute and those which are without. He said, at p. 259 :

> This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase. E

The realities of each case must be regarded. Is there any difference in substance if the man in leaving the work has a choice of two permitted ways over adjoining premises before he reaches the public highway, instead of only one ? I cannot see why there should be. Nor could the F Court of Appeal in *Foster* v. *Edwin Penfold & Co., Ltd.* (13), where the accident befell a man when using a permitted means of egress at a place where he was allowed to go, not as a member of the public, but only in virtue of his employment. It was held to be immaterial that there was an alternative way of egress. The man had parked his car on a G private wharf adjoining the employers' premises. He was not bound to go home by car, though to do so was usual. Romer, L.J., in holding the case to be within the Act, said, at p. 259 :

> He was, however, bound as part of his service to leave the employers' premises, and he was entitled to leave them by any permissible way and in any permissible H manner. He was leaving them by a permissible way and in a permissible manner, and the accident occurred before he had finally got free from those premises and was in a public place, that is to say, on the public highway.

I agree completely with that statement. I think that it applies to the facts of the present case. In my opinion, when Weaver got into the train, and not before, he was in what may be called a public place—

that is, on a public railway, which he was entitled, by contract with the railway company, to use like other members of the public. The platform was not a public place. It was specially provided by arrangement with the employers for the use of the respondents' men. The public had no right of access to it. There was no public means of access to it. It was provided solely as a means of access to, and egress from, the colliery. There was no contractual obligation on the man to use it, but there was clearly a practical compulsion, because practically all the men used it. It was beyond question a proper and usual means of access and egress, provided by the company for that very purpose. I cannot see why the bare possibility that a man may leave the work by road, walking or bicycling, can make a difference. When Weaver was knocked off the platform, he was still surrounded by his fellow-workmen, and the risk of being knocked off by the jostling crowd was a risk still incidental to his employment. The platform was in that respect a dangerous place, just as much as the dock premises which the man was crossing were in *Stewart's* case (7). He had not become an ordinary member of the public, and had not disentangled himself from his employment. He was, accordingly, still in the course of his employment.

I think that the appeal should succeed, though with all the doubt which is proper to be felt when I am differing from the Court of Appeal. The Lords Justices refer to *Penfold's* case (13), but do not show clearly how they distinguish it. Their decision is determined by their view that the relevant and governing authority was *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1), followed in *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5). If I thought that *Hewitson's* case (1) did govern this case, I should unhesitatingly follow it, whatever my own view was. However, I agree, if I may say so, with the decision in *Hewitson's* case (1). The essential facts were that the man was travelling on a train on his way home. He was injured when his train came into collision with another some miles from the colliery. I do not see how it could be said that he was using a permitted means of egress from the colliery. He was on his way home on a public conveyance. He had no greater right to claim that his employment was continuing than if he had been bicycling home on the public street when the accident happened. The fact that the colliery had arranged with the railway company to provide a special train for the men did not extend the course of the employment, as it would have done if the men were bound by their contract of employment to use the train, or, it may be, if there was no other possible way for the men to get to and from their home, or from or to the colliery, as was the case in *Richards* v. *Morris* (14). LORD BUCKMASTER sums up the position thus, at p. 67:

> I think it would be wrong, having regard to the purpose of this statute, as disclosed both in its construction and in its history, to narrow the meaning of the words used; they are general words intended, as I regard them, for a wide and general application; but I find myself unable so to construe them as to include

in their operation the right of travelling by a train which the workman was under no obligation and no proved necessity to use.

It was natural and proper in that case, as also in *Brentnall's* case (6), to emphasise the question of obligation and duty. Unless there was some obligation and duty, the accident could in no sense be connected with the employment. If there was an obligation or duty, as there is in the case of a man going about the public street under his employer's orders, he would be entitled to compensation if injured by an ordinary street risk. So also if sent on duty by train. In a case like the present, however, where a man was simply using the usual and proper way provided for leaving the colliery, I do not see the relevance of the idea of duty, except in the artificial sense that a man owes his employers a duty to come to his work and to go away when his work is ended. I think that it is in some such sense that duty has been referred to in certain of the cases of this nature. Similarly, in *Armstrong, Whitworth & Co.* v. *Redford* (4), it was said that the girl who slipped on the canteen stairs was endeavouring to comply with the duty of punctuality. However, the idea of duty was, in the strict sense of the term, relevant in *Hewitson's* case (1), and the absence of duty or obligation to be in the train took the case outside the Act. With the greatest respect, the position in the present case is quite different, and I am unable to agree with the Court of Appeal when they say that the appellant could succeed only if he could show that he was on the platform by reason of an obligation subsisting between himself and his employers to avail himself of the facilities afforded by the halt and by the stoppage of trains thereat. Nor do I agree that it is relevant to observe that, when he stepped from the colliery premises (I suppose when he stepped from the bottom step of the stairway on to the platform), he was free until the next day from any *nexus* of obligation to his employers. That is equally true in any relevant sense of the whole time after he ceased work, because, as soon as he did so, he would not have been bound to obey orders to work. He had finished his allotted day's work, and, apart from some emergency, was free to go home. All the same, however, the course of employment admittedly continued after he left his actual work and was engaged in the process of leaving the premises. In the same way, in the intervals during the day's work a man does many things, such as taking refreshment, or moving about for personal reasons, which cannot in any ordinary sense be said to be in discharge of a duty or obligation to his employers, yet he may still be entitled to claim that the course of his employment continues. I deprecate the use in this connection of such words as "*nexus* of obligation." If they mean the same as "the course of the employment," they are superfluous. If they mean something else, they may stultify the operation of the Act. I think that the appeal should be allowed.

LORD ROMER: My Lords, of all the problems to which the Workmen's Compensation Acts have given rise, by no means the least difficult is that of determining when a workman's employment may be said to begin and end, for it has long been settled that the employment may begin before he embarks upon the actual work which he has been engaged to do, and may not end the moment when the day's work is finished. In *Cross, Tetley & Co., Ltd.* v. *Catterall* (15), the workman was engaged to work in a colliery which was approached by a bridge built by the employers over a canal for the convenience of their employers, and the workman fell into the canal from the bridge while going to his work. In giving his opinion, LORD HALSBURY, L.C., said, at p. **490**:

> I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment at the moment he reached the bridge. He was doing something on his master's behalf, that is to say, he was on his way to the colliery for the purpose of working.

The result would, of course, have been the same if the accident had befallen the workman when crossing the bridge on his way home at the end of his shift.

The task of administering the Acts would be considerably easier if it could be deduced from this that, in the case of a workman not residing upon his employer's premises, his employment begins when he leaves his home in the morning for the purpose of going to his work, and ceases only when he gets home again after the day's work is done, but such is not the law. What LORD HALSBURY, L.C., said was that in the case before him the workman was in the employment the moment when he reached the bridge. As was said by LORD FINLAY in *Longhurst's* case (7), to which I shall have to refer in detail later on, the decision in *Catterall's* case (15) [p. 252]:

> . . . established that the employment *may* begin as soon as the workman has reached his employer's premises or the means of access thereto. And in the same way the employment *may* be considered as continuing until the workman has left his employer's premises.

In that case, LORD FINLAY did not add " or the means of access thereto," but obviously this addition is to be implied. It is also plain that by the expression " employer's premises " he meant the premises upon which the workman is employed to work, for such premises may or may not be the premises of the employer. Indeed, as will presently appear, *Longhurst's* case (7) itself was one in which the workman was engaged on work in a ship which did not belong to his employers. However, whether the premises upon which the workman is employed belong to the employer, there cannot in general be much difficulty in ascertaining what those premises are. The real difficulty is in ascertaining the " means of access thereto " within the principle to which LORD FINLAY was referring. The clue to the solution of this question is, I think, to be found in the words of LORD FINLAY which immediately follow the passage which I have just cited. He said, at p. **253**:

> The case would be different if the workman was at the time of the accident on the public highway on his way to or from his work. His employment cannot be considered as having begun if he is merely in transit in the public street or road

> to or from his employer's premises. Of course, if his employment were of a kind which is pursued on the highway he might be in the course of his employment while there, but I am speaking of cases in which he is in the public way merely in exercise of the public right of passage there on his way to or from his employer's. The present case belongs to a class of cases where the thing on which the workman is employed is lying in a dock or other open space to which he obtains access only for the purposes of his work.

There must be excluded from the means of access, therefore, any part A of the route which is open to the public at large. However, if the workman be using a means of access to the place of his work which is not open to the public at large, but is open to him merely by reason of his employment, the case is different, and in using those means of access the workman may well be acting in the course of his employment, whether B the access be over premises belonging to his employer or over premises belonging to a third party. That this is so was clearly laid down in *Longhurst's* case (7). The material facts in that case were as follow. The employers were engineers and ship repairers, and were engaged in effecting repairs to a barge which was lying in the South West India C Docks. The workman, who was a carpenter, was in their employment on this work. The docks were under the control of the Port of London Authority. They were not open to the public for traffic, but the appellants and their workmen had the permission of the authority to pass through the docks on their way to and from the barge on which D they were at work. One evening in November, the workman left the barge at the conclusion of his day's work, and was proceeding homewards in the darkness by way of the quay, when he unfortunately missed his way, fell into the dock, and was drowned. His widow thereupon claimed compensation from the employers. The claim was disallowed E by the county court judge, who held that, when the deceased got off the barge on to the quay, the relationship of master and servant ceased as completely as if he had got off the barge on to the highroad. The Court of Appeal reversed this judgment of the county court judge, and, on appeal to your Lordships' House, their decision was affirmed. LORD F DUNEDIN in his opinion quoted with approval the following words which had been used by PICKFORD, L.J., in the court below [p. 257]:

> The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment. G

Then LORD ATKINSON said, at p. 258:

> In argument some distinction was attempted to be drawn between the case where the workman has to traverse the private property of his employer to get to his work, and that where to do so he has to traverse the private property of another with the consent of that other. I do not think that is a sound distinction. When a man walks along the public streets to get to his work he is doing something which he has a perfect right to do irrespective altogether of his employment. H The right does not spring from his employment at all. It belongs to him as a member of the public.

I have already cited the observations of LORD FINLAY in the same case.

It is instructive to compare with *Longhurst's* case (7) the decision of your Lordships' House in *Davidson (Charles R.) & Co.* v. *M'Robb or*

Officer (8). The workman there was the chief engineer of a ship lying in a part of a harbour which was ordinarily a public one, but which had been taken over temporarily by the Admiralty and closed to the public, and to which access was granted only by an Admiralty pass. On returning to his ship one night by way of the harbour quay, the workman fell into the A water and was drowned. It was held (LORD FINLAY dissenting) that his dependants were not entitled to recover compensation. LORD FINLAY considered the case to be indistinguishable from *Longhurst's* case (7), but the rest of their Lordships distinguished that case, on the ground, as I understand it, that the public harbour did not become a B private means of access to the ship by being taken over temporarily by the Admiralty. All their Lordships, however, recognised the distinction which had been established in *Longhurst's* case (7) between a public and a private means of access to the place where a workman does his work.

C My Lords, in view of these cases, it must, in my opinion, be taken to have been settled by the authority of this House that, after a workman has finished his day's work and started out on his way home, his employment continues while he is traversing the premises on which he has been working and any private means of access thereto which he is D entitled to use by reason only of his status as a workman, but that, unless engaged on some special errand for his employer, which necessitates his being there, his employment ceases when he reaches a place to which the public have a right of access, such as the public street. From that moment, he loses his identity as a workman, and becomes one of the E general public. A similar principle, of course, applies to a workman on his way to work. In the words of LORD BUCKMASTER in *Sparey* v. *Bath Rural District Council* (10), at p. 286:

> . . . when . . . the workman is no longer under any control, and is in all respects and for all purposes in the same position as an ordinary member of the public enjoying F the same liberty and sharing the same risks the danger he there encounters is one which other members of the public equally share.

In the same case, LORD RUSSELL OF KILLOWEN said, in reference to the workman, who there failed to establish his claim to compensation [p. 288]:

> G . . . he was riding home, not along his employer's premises in virtue of his status as an employee, but along the highway in virtue of his status as a member of the public.

In all cases, therefore, where a workman, on going to, or on leaving, his work, suffers an accident on the way, the first question to be determined is whether the workman was at the place where the accident occurred H in virtue of his status as a workman or in virtue of his status as a member of the public. It was owing to the fact that this question was answered in favour of the workman in *Northumbrian Shipping Co., Ltd.* v. *McCullum* (12) that he succeeded in his claim for compensation. The workman in that case was a seaman returning to his ship, access to which was obtained by passing over a private quay. The case, therefore, fell within the principle to which I referred just now, a principle which has never been enunciated more clearly than it was in the opinion of Lord Macmillan in that case, at pp. 670, 671 :

> It has been recognised time and again that the sphere of a workman's employment is not necessarily limited to the actual place where he does his work. If in going to or coming from his work he has to use an access which is part of his A employer's premises, or which he is only entitled to traverse because he is going to or coming from his work, he is held to be on his master's business while he is using that access. Take the analogy of a domestic servant. . . . I imagine no one would doubt that a maidservant returning home from her night out and meeting with an accident in the private avenue of her master's house, though at a point a quarter-of-a-mile from the house, would be entitled to compensation. And equally so if she suffered an accident on a private access to the house which, although not the property of her master, she had permission to traverse only as one of the household B servants. In the case of a town house in a street it would doubtless be necessary to draw the line between the public highway and the master's house with just the same precision as the line is drawn between the public harbour and the ship. If the maidservant fell on the area steps she would presumably be within the Act, but if she fell on the pavement a few feet away she would presumably be outside the Act, always of course assuming that she was not on some errand for her master at the time.

C

My Lords, upon this principle, it would seem reasonably plain that the appellant in the present case was entitled to the compensation which he seeks. After finishing his work at the colliery, he proposed returning to his home by train. In order to get to the train, he passed directly from the colliery premises on to a platform, which was the only means D of access from the colliery to the train, and upon which he had no right to be except by virtue of his status as an employee of the colliery. While on the platform, and by reason of his being on the platform, he met with an accident. In my opinion, it was an accident arising out of and in the course of his employment. The county court judge and E the Court of Appeal, however, considered that they were precluded from giving the appellant relief by the decisions of your Lordships' House in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) and *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5). My Lords, if I am to accept the conclusion that the effect of these two decisions is to deprive the appellant in the present F case of any right to compensation under the Act, I must, as it seems to me, necessarily suppose that they lay down a principle inconsistent with the principle which had already been established by your Lordships' House in *Longhurst's* case (7) and accepted in *M'Robb's* case (8), and has since been affirmed and applied in *McCullum's* case (12). As this G is an altogether impossible supposition, it is necessary to ascertain what really were the grounds of the decisions in *Hewitson's* case (1) and *Newton's* case (5).

I need not state in detail the facts in *Hewitson's* case (1). It is sufficient to say that, if, in the present case, an accident to the appellant H had occurred while he was actually in the train travelling towards his home, the case would have been in all material circumstances comparable to *Hewitson's* case (1). The two cases would have been indistinguishable. The workman in *Hewitson's* case (1), however, failed, upon the ground that he was under no contractual obligation to his employer to be in the train. All their Lordships who were responsible for the decision were at pains to ascertain whether or not Hewitson was under any such obligation. It would seem to follow from this that they did not regard Hewitson when in the train as being engaged upon one of those acts which are always considered as being part of a workman's employment A because they are incidental to the employment proper. They must have regarded him, in other words, as a workman who had left the scene of his labour and "the means of access thereto" within the meaning attributed to those words in the cases to which I have previously referred, for, when a workman is engaged in performing an act which is merely B incidental to his employment proper, it is hardly, if ever, true to say that he is under a contractual obligation to his employer to perform it. When, for instance, he is engaged in taking refreshment on the premises during his dinner hour, it is not accurate to say that he is performing some contractual obligation or duty towards his employer. Nor can C that accurately be said of a workman going home after the day's work is finished. It is well-settled, moreover, that a workman leaving or going to the scene of his actual work may use any one of two or more alternative routes over the premises of his employers, but he is under no obligation to his employers to use one route rather than another. D Take, too, the case of premises which open directly on to a public street. If a workman, on finishing his work, is under a contractual obligation to leave the premises, he must, when he steps on to the highway on leaving, be under a contractual obligation to be there, and any accident with which he may meet by reason of his being there would be an E accident arising out of and in the course of his employment. That this is not so is made quite clear in the authorities which I have already cited.

The truth of the matter is that in all these cases of a workman going to or leaving the scene of his labours the necessity of deciding the F question whether, at the time of the accident, the workman is acting in pursuance of a duty which he owes his employer—namely, is performing some contractual obligation towards his employer—arises only when the workman at that time has left, or has not yet reached, as the case may be, the scene of his labours, or "the means of access thereto." If the G maidservant in LORD MACMILLAN'S illustration meets with an accident before she has reached the public highway, she may, in a proper case, recover compensation even though she is leaving her employer's premises because it is her night out. She is engaged in doing something which is merely incidental to her employment proper. She will not be refused H compensation merely because she owes no duty to her employer to go out. If, however, the accident happens after she has reached the public highway, the question at once arises whether she is there in performance of her duty to her employer, such as posting his letters, or doing some shopping on his behalf.

An employee, after he has left the scene of his labours and "the means of access thereto," may find himself upon a highway or at a public railway station. He will by then have fully performed the act of going home which is incidental to his employment. Whatever he does thereafter, whether on foot, or by omnibus, or by train, he does in virtue of his status as a member of the public, and not in virtue of his status as an employee. Suppose, however, that, when continuing his journey home, he makes use of the highway or the railway, not by travelling in a conveyance available to the public at large, but by travelling in a conveyance which is available to him only in virtue of his status as an employee. In such a case, is he still performing the act of getting home which is incidental to his employment ? In view of *Hewitson's* case (1), as I read it, this question must be answered in the negative. If it had not been answered in the negative in *Hewitson's* case (1), it would not, as I have been endeavouring to show, have been necessary for their Lordships to consider the question whether Hewitson owed a duty to his employers to be in the train. I am unable, therefore, with all deference to those who think otherwise, to regard *Hewitson's* case (1) as having any bearing upon the one which your Lordships are now called upon to decide. Still less has *Newton's* case (5) any such bearing. The workman there, after leaving his home in order to return to the colliery, was making his way towards the place from which the train was to start, and, while doing so, met with an accident. He had not even entered the train. It seems to me to have been a very plain case. My Lords, for these reasons, I am of opinion that the appeal should be allowed, and an order made in the terms which have been indicated by my noble and learned friend LORD ATKIN.

LORD PORTER: My Lords, Wilfred Weaver has claimed, and has been refused, workman's compensation by a county court judge and by the Court of Appeal. His claim was against the Tredegar Iron and Coal Co., Ltd., who carry on the business of colliery proprietors at Pochin Colliery, which lies between Newport and Tredegar. At the time of the accident, he was a collier's helper living at Tredegar. The facts are not in dispute, and were agreed as follows:

> The colliery premises at Pochin are partly on one side and partly on the other side of that portion of the London Midland and Scottish railway which runs from Newport to Tredegar. On the strip of railway property which bisects the colliery premises there is not only a railway line but also a platform known as Pochin Halt which is owned and maintained by the railway company. The railway company do not permit the general public to use the halt and there is no means of access to the platform except from the colliery premises. By arrangement between the respondents and the railway company trains are provided and paid for to take such employees as desire to use them to Tredegar or Newport. The halt is not shown on any of the company's regular passenger time-tables, but the trains are owned, driven, and managed by the railway company's servants. The employees do not pay any fare to the railway company direct ; the respondents deduct from the wages of those who use the trains 1*d.* per day as return fare. In addition to this means of access to or egress from the colliery, the employees are entitled to proceed to or from it by an entrance leading to the main road and the workmen can choose either method of reaching or departing from their work at their pleasure. They are under no contractual obligation to use the trains but in fact nearly all the workmen do so travel.

On Mar. 3, 1938, the appellant in the ordinary routine at the end of his day's work went to the halt platform and waited for the train. When it arrived, the appellant, in the press of workmen pushing their way, fell off the platform. His left arm was caught between two railway coaches and injured, with the result that it had to be amputated above the elbow. It is admitted that he was totally disabled by this accident. The appellant proceeded to arbitration, claiming that the accident had arisen out of and in the course of his employment. It is not disputed, I think, that, if the injury had been received in the course of the man's employment, it also arose out of it. It is clear that, while on the platform, he was exposed to the danger of either falling or being pushed off it, and of being struck by a train which might happen to be there. The respondents, however, maintained that the accident did not arise in the course of the man's employment. The county court judge held that the respondents were right, and, as his judgment is short, I quote it in full:

> I find this case indistinguishable, almost fact for fact, from *Hewitson's* case (1) where a special train was provided for workpeople, and there is the other decision of the House of Lords in *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5), in which LORD CAVE reaffirms the principle that the supreme test is duty, and, as there was obviously no duty in this case for this young man to be there, I think that this application must be dismissed. There must be an award in favour of the respondents, with costs on Scale B.

To my mind, it is clear that, in arriving at this conclusion, the county court judge is not making any independent finding of fact, but is merely drawing the deduction that the accident could not be said to arise in the course of the man's employment because he felt himself bound by two decisions of your Lordships' House to come to that conclusion. Of course, if he was right in thinking this case to be indistinguishable from those upon which he placed reliance, your Lordships are bound by the findings and reasonings contained in them. Eventually it will be necessary to consider how far those cases, either in their reasoning or facts, are analogous to the case now under consideration, but, before dealing with that question, I desire to express the view which I should have formed of the present case were I untrammelled by those decisions.

The test which is put by the county court judge is whether there was any duty on the part of the workman to travel by the train in question, and he comes to the conclusion that there was obviously no duty in the present case. In some cases, no doubt, it may be helpful to consider whether the man owed a duty to his employers at the time of the accident, and, indeed, if duty be construed with sufficient width, it may be a decisive test, but, so construed, to say that the man was doing his duty means no more than that he was acting within the scope of his employment. The man's work does not consist solely in the task which he is employed to perform. It includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employer's premises to another, and periods of rest may all be included. Nor is his work necessarily confined to his employer's premises. The man may be working elsewhere—e.g., in building a house, or in work on the road, or in work at a dock. The question is not, I think, whether the man was on the employer's premises. It is rather whether he was within the sphere or area of his employment. No doubt the questions of what is incidental to the man's employment and what is the area or sphere of his work are matters which are often difficult of ascertainment, and may sometimes turn on fine distinctions. In the ordinary case, when a workman is employed on his master's premises, he ceases to be in the course of his employment when he has left those premises and has reached the public street. Equally, he may have left those premises if he reaches a place which is not public, but from which he, like others who are not engaged in the same employment, can proceed to his home. Nor, in my view, does it make any difference that, when he reaches the public street, he is conveyed from the premises in a coach provided by his employer, nor that, when he reaches the place which is not public, he is carried in a railway train or other conveyance for the provision of which his employer has made the necessary arrangements. In either of the latter cases, he is not in the course of his employment, though he is using facilities for reaching his home which are granted to him by his employer. It is true that he is being carried in a vehicle which has either been provided by his master or for the provision of which his master has arranged, but he is being conveyed over ground which is not confined to the use of himself or his fellow-employees, and, generally at any rate, unless he is compelled to travel in that conveyance, the course of his employment has ceased. The fact, however, that he is using a facility, and not a compulsory method of progression, is not decisive. If on the premises there is a staircase and a moving stair, and he is entitled to use either, the moving stair is a facility, yet, if, in getting from one part of the premises to another, he uses the moving stair and is injured, he is in the course of his employment. Of course, if the facility is something which does not come into operation until after the course of his employment has otherwise ceased, the fact that the employer supplies it does not make the workman's use of it a use in the course of his employment. However, if it is in the course of his employment, the fact that he might have chosen an alternative method does not disentitle him to recover.

It is in the course of his employment, and, if the phrase be used, it is part of his duty, both to go to and to proceed from the work upon which he is engaged, and, so long as he is in a place in which persons other than those so engaged would have no right to be, and, indeed, in which he himself would have no right to be but for the work on which he is employed, he would, I think, normally still be in the course of his employment. No very logical line can be drawn. In a sense, it might be said that every man, as soon as he proceeded from his home towards the works at which he was employed, was in the course of his employment. With equal plausibility I think it might be said that he was not in the course of that employment until he had begun to undertake the task upon which he was engaged. Neither view is a satisfactory one, and, as I understand it, your Lordships' House has taken a middle course in holding that the man as a rule has not yet entered upon the course of his employment while he is merely proceeding towards the area in which his work is carried on, but has done so when he has arrived at his employer's premises, or at some place to which he would not be entitled to have access were it not for that employment. I am not, of course, considering cases in which the necessities of the work compel him to traverse the public streets or other public places.

The difficulty then is to decide at what point the employment begins and ends. The test suggested on behalf of the respondents was as follows. When an accident happens whilst the workman is arriving at, or leaving, the premises at which he does his work, an accident which happens before he reaches them or after he has left them arises out of and in the course of his employment if he was bound to proceed by the way he did by an express or implied term of his contract, provided that that way was private property. It was admitted that, if there were several methods of egress from the place in which he was employed, he was still in the course of his employment in using any of those methods provided they were situated upon the owner's premises, but it was said that if one or any of them were off those premises the workman not being obliged to use such a method of leaving his work was no longer to be considered to be in the course of it after he had actually left the premises themselves.

This result is said to follow from *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) and *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (5). The actual facts in these cases were widely different from those in this. In *Hewitson's* case (1), the man had boarded a train for the provision of which his employers had made arrangements with the railway company, and was some 6 miles on his way home before the accident occurred. In *Newton's* case (5), he had not even reached the halt provided by his employers on the railway by which he was permitted to travel to his work, but was crossing the railway line to reach it when he was injured by a passing train. In either case, it could readily be asserted that the employer was but providing a facility in order to enable the man to reach or leave the area of his employment. It would be difficult to say that the workman was in the course of the employment itself. In the present case, on the contrary, the place at which the accident happened was contiguous with the employers' premises, could be reached only through them, and was open to their workmen alone.

There is authority in your Lordships' House for the statement that a workman who has reached a point on his employer's premises, even though that point be a long way from the place at which his work begins, is already in the course of his employment, and further authority for the proposition that it makes no difference that the spot he has reached is not the employer's premises themselves, but some place over which his right to proceed is attributable solely to the work upon which he is engaged. It is said, however, that, though this last statement be true, it applies only where that place is the only method of approach to, or departure from, the premises where the work is carried on. I find it difficult to see why logically this should be so. The workman has to leave the premises. The employer has arranged that he may go by exit A or exit B. The workman chooses A and is injured. These spots being on the employer's premises, admittedly he could recover. Why should he fail because, though one is on the employer's premises, the other is not, but is a place to which he has access only from his employer's premises, and only because he is there employed ? Certainly I think there is no case which so decides. By arrangement with the railway company, a platform confined to the employers' workmen, and reached through their premises alone, is a recognised means of egress. Until the workmen have passed through it to a place not confined to them, they are still in the course of their employment, even though there is an alternative path which they might have used. That the machinery adopted was for the employer to supply them with tickets, and that, therefore, they could insist on travelling by train, is, I think, immaterial.

Often enough, no doubt, in considering the facts of an individual case, it is of assistance to recall that the place off the premises is the only means of entrance or exit, and thus it comes about that, in expressing their views upon those facts, the Court of Appeal, and, indeed, members of your Lordships' House, have laid emphasis upon that fact. *Hewitson's* case (1) and *Newton's* case (5) are instances in which such expressions of opinion were used. The decisions in those cases, however, did not turn upon the fact that there was more than one entrance or exit, but turned upon whether at the moment of the accident the man was in the course of his employment. In the particular circumstances, a convenient test was whether the man owed any duty to his employer to be there, and, in determining whether or not there was any duty, the fact that there were alternative ways to the workman's home after he had left the area of his employment was no doubt an important element for consideration. Even, however, if duty be taken as the test to apply where the area of the employment is reached, it may be as much the workman's duty to enter or depart by one alternative way as by another. He is in the course of his employment, not because he chooses that way situated on the premises rather than that off, but because either is a method of entering or leaving the area of his work—a method which is confined to him and to his fellow-workers. The only expression of opinion to the contrary which I can find in either case is the disapproval expressed by Lord Wrenbury in *Hewitson's* case (1), at pp. 95, 97, of *Cremins* v. *Guest, Keen & Nettlefolds, Ltd.* (2), but more particularly of *Walton* v. *Tredegar Iron & Coal Co.* (16), but that expression is his alone, and is not a necessary basis for his view. Much less is it a necessary basis for the views of the other noble and learned Lords who adjudicated upon that case. It is therefore not binding on your Lordships' House. Speaking for myself, I think that *Walton's* case (16) was rightly decided. As to *Cremins*' case (2), I do not think that it is necessary to express any opinion, as I do not think it analogous to this.

If support for the opinion I have expressed be required, I think that it can be found in the dissenting judgment of Romer, L.J., in *Holness* v. *Mackay & Davis* (17), at p. 327, which was expressly approved by Lord Finlay, L.C., in *Stewart (John) & Son (1912), Ltd.* v. *Longhurst* (7), at p. 255. If the facts of the former case be examined, it will be found that there were two methods of approach to the man's work, both of which required him to cross a railway line not under the control of the appellants, but at different points and with varying degrees of danger. He chose the more dangerous method, and yet was held by Romer, L.J., to be entitled to recover.

The same principle is, I think, to be derived from the words of Atkin, L.J., in *Howells* v. *Powell Duffryn Steam Coal Co.* (18), at p. 485, and, indeed, from all the judgments in that case. An even more direct authority is to be found in *Foster* v. *Edwin Penfold & Co., Ltd.* (13), in which a workman left his car on a wharf backing on to, but not part of, his employers' premises. In the course of driving away at night, he fell into a dock, and was drowned. He could have left his car elsewhere than on the wharf, but he was permitted, as a privilege of his employment, to leave it there. In those circumstances, the Court of Appeal held that his dependants were entitled to recover, because he was bound to leave his employers' premises in some way, and was entitled, though not bound, to leave them in the method adopted. As was said by Romer, L.J., at p. 259:

> He was leaving them by a permissible way and in a permissible manner, and the accident occurred before he had finally got free from those premises and was in a public place, that is to say, on the public highway.

Finally, the conclusion at which I have arrived is, in my view, consistent with the line of reasoning adopted in the opinion of Lord Macmillan in *Northumbrian Shipping Co., Ltd.* v. *McCullum* (12), in which the other noble and learned Lords concurred, and comes directly within the words to be found at p. 670:

> It has been recognised time and again that the sphere of a workman's employment is not necessarily limited to the actual place where he does his work. If in going to or coming from his work he has to use an access which is part of his employer's premises, or which he is only entitled to traverse because he is going to or coming from his work, he is held to be on his master's business while he is using that access.

Nor can I see anything, either in the opinion itself or in the collocation of the words, to suggest that they are confined to a case where there is only one means of access whether on or off the premises. I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the appellant); *Furniss Wells & Co.*, agents for *Arthur J. Prosser*, Cardiff (for the respondents). A

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

B

FAKISANDHLA NKAMBULE *v.* R.

[Privy Council (Lord Thankerton, Goddard, L.J., and Sir Philip Macdonell), **April 18, May 7, 1940.**]

Privy Council — Swaziland — Criminal law — Evidence — Admissibility — Confession of one accused evidence against second accused—Inaccurate translation of letters used by court—No substantial injustice—Transvaal Proclamation (*No.* 16 *of* 1902), *s.* 20. C

The appellant was convicted by the Special Court of Swaziland of the murder of three persons. N. H., with whom he was tried, was accused of having committed the murders, while the appellant was accused of having incited him to do so. The appeal was brought on D the grounds (i) that a confession made by N. H. was inadmissible against the appellant, and (ii) that the translations of certain letters used at the trial were inaccurate. N. H. pleaded guilty at the trial, and intimated that he wished to make a full confession, but he also intimated that he had matters to raise in defence. In these circumstances, although his plea of guilty had been entered on the record and this was never changed, the trial proceeded as though each of the accused had pleaded E not guilty. N. H. in his evidence implicated the appellant. The law of evidence in Swaziland is governed by the Transvaal Proclamation (No. 16 of 1902), s. 20, which enacts that "no confession which may be made by any person shall in any case be admissible as evidence against any other person." The letters in question had been written at his dictation in the Swazi tongue. The English translation used by the F court was not proved, and in one sentence was later found to have been inaccurate:—

Held: the appeal should be dismissed, as the irregularities at the trial had not occasioned any substantial injustice, because (i) it was immaterial whether the evidence of N. H. was given in his defence or on behalf of the Crown after he had been sentenced on a plea of guilty, and, in any case, his evidence that the accused had incited him to G commit the murders was no part of his confession that he had committed them, and (ii) the meaning of all material sentences in the letters had been proved piecemeal by the oral evidence, and the sentence wrongly translated did not materially add to or diminish the incriminating nature of other passages in the letters.

[**EDITORIAL NOTE.** There is a well-settled rule that the Judicial Committee will H not advise His Majesty to allow appeals in criminal cases unless it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. In this case their Lordships, while regretting the irregularities in the trial, are satisfied that they were not such as to justify interference with the decision.

As to Appeals to the Privy Council in Criminal Cases, see HALSBURY, Hailsham Edn., Vol. 11, pp. 231, 232, para. 447; and FOR CASES, see DIGEST, Vol. 17, pp. 490, 491, Nos. 541-564.]

Cases referred to:

(1) *R.* v. *Fatshawa,* [1930] T.P.D. 526.
(2) *R.* v. *Zawels,* [1937] App. D. 342.
(3) *Re Dillet* (1887), 12 App. Cas. 459; 17 Digest 490, *542*; 56 L.T. 615.

APPEAL by special leave from the judgment of the Special Court of Swaziland, dated Oct. 15, 1938, whereby the appellant was convicted of murder. The facts and arguments are fully set out in the judgment of their Lordships delivered by SIR PHILIP MACDONELL.

Horace Douglas, K.C., and *S. N. Bernstein* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Kenelm Preedy* for the respondent.

SIR PHILIP MACDONELL: This is an appeal by special leave from the Special Court of Swaziland, which had convicted the appellant of murder. The appellant and a certain Nhloko Hlatshwako, who will be referred to hereafter as the first accused, were indicted before the Special Court of Swaziland for the murder of certain three persons, the first accused as having actually committed the murders and the second accused, the appellant, as having incited him to commit them. The Special Court convicted them both, but it is only the second accused who appeals.

The appellant is a native chief in Swaziland, a territory under the protection of the Crown and governed as to the law of evidence by the Transvaal Proclamation (No. 16 of 1902) and as to criminal procedure by the Transvaal Criminal Procedure Code, Ordinance No. 1 of 1903. The essential facts in the case were these. The appellant's mother died in 1936 and a daughter of his in 1937, and somewhere in July, 1937, or Aug., 1937, he sent his "doctor," the witness Nyandeni, to find someone who had the knowledge and skill necessary to make a rope and put it on the graves of these two deceased persons so that by its agency the dreams troubling him might be turned from him and those responsible for the two deaths discovered. The rope, it was believed, would by some inherent magic kill the persons responsible. The witness Nyandeni eventually found the first accused, who, according to him, undertook to perform this rope ceremony. The appellant had duties as court *induna* at Hlatikulu, the chief town of Swaziland, which kept him there during the weekdays, and, following on instructions by him, the witness Nyandeni wrote the letter A, which was signed in the name of the appellant, and was addressed and duly delivered to the first accused. This letter states, *inter alia*, that the appellant's children "are finished"—that is, dead—that the person killing them is at the appellant's village, that the appellant is busy and cannot come personally, that the first accused must bring all his medicine bags with him, that "it is the Chief Fakisandhla who is calling" him, and that the "advance payment" is ready. In accordance with this letter, the first accused came to the witness Nyandeni's village on a day which can be fixed as Thursday, Sept. 9, 1937, and Nyandeni wrote to the appellant saying that he had arrived. In reply, the appellant dictated to the witness Memorial two letters, letter B addressed to Nyandeni and letter C addressed to the first accused, both in the same envelope, and it is in evidence that the contents of each letter became known to Nyandeni and to the first accused. In letter B, the appellant says that he understands that the first accused has arrived and is unwilling to do the work until he has seen him, the appellant, but that his duties at Hlatikulu prevent him from coming. Letter B continues as follows:

> . . . it is necessary that this man [the first accused] should carry on because you know that it is Mpindela, Mbuko, Majalimane and Ngilane.

The first two of these so named are two of the three persons proved to have been murdered by the first accused. The other two persons named were at all material times absent and at a distance. The next words in letter B, according to the translation before the court at the trial, were:

> As far as the others are concerned, the medicine will take its course.

According to affidavits sworn after the trial and put in as part of the printed record before their Lordships, however, this portion of the letter should have been translated " On the other hand, the work itself will simply proceed," with no mention of medicine. In this letter B, the appellant then speaks of advance payment, and enjoins stealth or secrecy in doing the work, and also says that no one must be told. In letter C, the appellant tells the first accused that he understands what he is saying and that he will himself come on Sunday.

Nyandeni and the first accused received these letters on Friday, Sept. 10, 1937, and the same day they went to Buseleni, one of the appellant's villages, where Nyandeni pointed out to the first accused, Mpindela and Mbuko, named in letter B, and also one Patekile, a woman, whose name was not in letter B but whom the appellant said he had mentioned to the witness Memorial when dictating that letter to him. It is clear that somehow her name was mentioned and had become known to Nyandeni and the first accused. As some of the members of the village were absent, Nyandeni and the first accused did nothing that day, but returned to Nyandeni's village. Next morning, Saturday, Sept. 11, they came again to the village Buseleni, and the first accused, with the inhabitants ranged in a half-circle before him, proceeded to conduct a witch-doctor inquiry. He had two earthenware pots, one on a fire, and a smaller one which he held up to his breast. On his own admission, the smaller pot contained two separate substances, one harmless, the other arsenic, and, by a little manipulation, he administered the harmless substance to the rest of the village but arsenic to the two persons, Mpindela and Mbuko, mentioned in letter B, and also to Patekile, whose name the appellant says ought to have been in letter B, whereby these three persons died the same day. Admittedly nothing was done with regard to the rope which, according to the appellant and the witness Nyandeni, the first accused had been called in to make. Nyandeni, who throughout his evidence sought to exculpate the appellant, had to admit that the first accused had said earlier that he would use the earthenware pot, a thing which would have nothing to do with the rope ceremony, but which could be used to give the villagers something from it to swallow, and so to test their responsibility for the matter to be discovered, whatever that might be.

On Sunday, Sept. 12, the appellant came over to Nyandeni's village as he had promised and gave the first accused £2 10*s*. and a promise of some cattle. His behaviour at this interview with the first accused was inconsistent with his having ordered any rope ceremony—and, since no rope had at that time been made, the first accused had not done anything then to earn any payment—and was evidence that he had called in the first accused for the purpose of killing the three deceased persons. His letters and his behaviour on the Sunday were corroboration of the evidence of the first accused that the appellant had sent for him to kill these three people as being responsible for the deaths of his mother and daughter, and had never asked the first accused to perform the rope ceremony at all. Assuming that the evidence of the first accused was admissible and that the letters were properly before the court of trial, the court had before it sufficient evidence for finding the appellant guilty of inciting the first accused to commit these murders.

Two main points were urged to their Lordships in support of this appeal. When the first accused and the appellant as second accused were arraigned, the appellant pleaded not guilty. The first accused pleaded guilty, but, prior to his doing so, his counsel said that his client intended to make a full confession of the murders, but would also say "in defence" that he had committed them at the instigation of the appellant, a tribal chief, and in the belief that the paramount chief of the tribe knew what he was doing. The president of the Special Court said that he thought that the proper course was to enter a plea of not guilty in the case of each accused. The Attorney-General, appearing for the Crown, agreed to this, but there is nothing of record as to whether the several counsel for the first accused and for the appellant said anything. Presumably they consented to the court's suggestion. The clerk of the court had entered on the record a plea of guilty for the first accused, and no alteration of this plea was at any time made on the record. The trial then proceeded as a joint trial of the two accused, as if each had pleaded not guilty. For the defence, the first accused and the appellant each gave evidence, and were cross-examined by the Attorney-General, and each was cross-examined on behalf of the other accused. The evidence of the first accused, an accomplice, implicated the appellant as having incited him to murder the three deceased.

It was argued before their Lordships that this procedure was wrong by reason of the Transvaal Proclamation (No. 16 of 1902), s. 20, which provides as follows:

> No confession which may be made by any person shall in any case be admissible as evidence against any other person.

Further, it was argued that the correct procedure, in accordance with that section and with Transvaal practice thereon, would have been to take evidence *aliunde* that the crime charged had been committed, and then to have sentenced the first accused on his plea of guilty, thereafter calling him as a witness for the Crown, on the principle that, before his evidence could be used to implicate any person mentioned therein, he should, by reason of having already been sentenced, have nothing to fear or hope when giving that evidence. The present case, however, being one of murder, one sentence only was possible. Counsel for the appellant cited *R.* v. *Fatshawa* (1), where the Transvaal Provincial Division quashed a conviction in which a third accused, after plea of guilty but before sentence, gave evidence against the two other accused. In that case, however, the third accused, after his plea of guilty, though invited to take part in the case by asking questions, declined to do so, the only thing he did being to give evidence, at the end of the case for the Crown, part of which implicated the other two accused. That case, then, is distinguishable as not having been a trial of that third accused jointly with the two other accused, while the present case, in the course it took, was a joint trial of the two accused, as if on a plea of not guilty for each of them. Further, it would appear that South African practice does permit a court to enter a plea of not guilty on behalf of a native or other ignorant person pleading guilty if it considers that he does not properly understand the effect of that plea, or if he seems to have matter of exculpation that he wishes to allege: see Gardiner and Lansdown on South African Criminal Law and Procedure, 2nd Edn., Vol. 1, pp. 238, 255, 257. Here the first accused through his counsel said that he wished to state certain facts—which, therefore, would need proof—which he thought furnished some defence for what he had done—namely, that the man inciting him was a chief, and that the paramount chief knew what he intended to do. There was some authority, then, for the procedure of the court in this case, though it certainly was irregular to allow the first accused's plea of guilty to remain on the record and not to alter it to one of not guilty. The difference between what the court did do and what strictly it would seem that it ought to have done in accordance with the Transvaal Proclamation (No. 16 of 1902), s. 20, and the practice thereon amounted to this. If the first accused had been sentenced before giving evidence and had then been called as a witness for the Crown, the Attorney-General could not have cross-examined him. In the course taken, the first accused was witness for the defence, so the Attorney-General could and did cross-examine him. In either event, however, it would still have been necessary to corroborate his evidence, and it cannot be said that the departure from what apparently is the correct Transvaal procedure was departure of substance from the principles of justice. In connection with this Transvaal Proclamation (No. 16 of 1902), s. 20, making confessions inadmissible, reference was made to *R.* v. *Zawels* (2), where CURLEWIS, C.J., said that, on a joint indictment and a joint trial, evidence given by one of the accused is admissible against the other, adding, at pp. **348, 349**:

> If in the course of giving such evidence one of the accused makes an admission of his guilt amounting to a confession, though such admission may not be admissible as evidence . . . against any other of the accused, but only as against himself, the rest of his evidence stands and is admissible like that of any other witness so far as it incriminates any of the other accused of the charge for which they are being tried

That is the case here. The evidence of the first accused that the appellant had incited him to commit the murders was no part of his confession of having committed them. In the opinion of their Lordships, the irregularity of leaving on the record a plea of guilty after in effect altering it to one of not guilty did not entail any real prejudice to the appellant.

The other argument in support of this appeal turned on the letters produced, letter A written by the witness Nyandeni in the name of the appellant, and letters B and C written by the witness Memorial, at the appellant's dictation. The originals in the Swazi tongue were produced and sworn to, but the language of the court was English, and no one was called to prove their English meaning—that is, a translation. An English translation was put in and used at the trial, but was not sworn to, and it would seem that, as stated above, there was a mistake therein as to the English meaning of a particular sentence in letter B. If there was no evidence produced to the court as to the meaning in English of those letters, then the court could not look at them, and their contents would not be before it. (It is quite possible that all parties to the case accepted by consent the translation which had been made, but not sworn to.) Detailed examination of the evidence given at the trial shows, however, that the meaning in the three letters of each sentence implicating the appellant was proved, though in piecemeal fashion. The witness Nyandeni was taken through each material sentence in letter A and admitted each to give correctly what the appellant had dictated to him, and the court interpreter will have rendered Nyandeni's answers into English. The material sentences in letters B and C were put to the appellant, and he admitted that he had dictated these to the witness Memorial. Again, the interpreter will have rendered his answers into English. In these sentences, so proved, the appellant requested the first accused to bring his medicine bags—obviously with medicine in them—named the persons to whom the attention of the first accused was to be directed, and enjoined secrecy and that nobody was to be told. In the opinion of their Lordships, the words wrongly supposed to be in letter B do not materially add to or diminish the incriminating nature of other passages in that letter, and their corrected translation does not effect any material change in their meaning.

Their Lordships are satisfied that, if the court of trial had had before it a correct, instead of an incorrect, translation of the disputed words in letter B, it must still have arrived at the same conclusion at which it did arrive—namely, that the appellant incited the first accused to commit these murders. Their Lordships regret the irregularities in the trial of this case, but are satisfied that they are not of such a character as would A justify interference with the decision appealed from. The scope of such interference is well understood, and it is only necessary to cite the words of LORD WATSON in *Re Dillet* (3), at p. 467 :

> The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, B unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

It is clear that no such injustice has been done in the present case. Their Lordships, therefore, are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. C

Appeal dismissed.

Solicitors : *E. F. Hunt & Co.* (for the appellant) ; *Burchells* (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

D

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.

[COURT OF APPEAL (MacKinnon, Luxmoore and Goddard, L.JJ.), **June 3, 4, 5, 1940.**] E

Insurance—Motor insurance—Third-party risks—Extension of protection—Indemnity of authorised driver while driving against liability " in respect of any claim by any person including passengers "—Claim by policy-holder—Road Traffic Act, 1930 (*c.* 43), *ss.* 35 (1), 36 (1) (*b*), (4).

The claimant was a chauffeur employed by the owner of a car. F The owner was injured in a collision, and, in proceedings in respect of that accident, she recovered damages against the chauffeur. The chauffeur thereupon claimed that he was entitled to be indemnified against the sum awarded as damages by the respondent insurance company under a policy issued by them to the owner. By the policy, in a section with a marginal heading " Third Party Liability " the G insurance company undertook to indemnify the policyholder against all sums which the policyholder should become legally liable to pay in respect of any claim by any person (including passengers in the car) for loss of life or accidental bodily injury or damage to property caused by, through or in connection with the car. The insurance was to extend to indemnify in like manner any person driving the car on the order or with the permission of the policyholder, and it H provided that such person should as though he were the policyholder observe, fulfil and be subject to the terms, exceptions and conditions of the policy, in so far as they could apply. The policy contained the usual arbitration clause. It was contended that the extension of the insurance was not an extension of the class of claimants and that, therefore, the policyholder could not be a claimant under the policy :—

HELD : (i) the chauffeur was bound by the arbitration clause.

(ii) (Luxmoore, L.J., *dissenting*) the words " any person " in the extension of the insurance against third-party liability meant any third party and did not include the owner's chauffeur. The latter was not entitled to be indemnified against the sum awarded as damages.

Decision of Atkinson, J. ([1940] 1 All E.R. 514) *varied.*

[**EDITORIAL NOTE.** The substance of this case is whether or not the policyholder can be called a third party within the meaning of those words as used in the policy of insurance where the claim is made by the insured person. The decision, of course, is based upon the particular wording of the policy, but the wording here in question follows the general form of wording used in such cases.

As to Extension of Protection, see HALSBURY, Hailsham Edn., Vol. 18, pp. 558, 559, paras. 901-903; and for Cases, see DIGEST, Vol. 29, p. 408, Nos. 3214-3217.]

Cases referred to:

(1) *General Accident, Fire & Life Assurance Corpn., Ltd.* v. *Watson* (1938), Mar. 11, Unreported.

(2) *Hamilton & Co.* v. *Mackie & Sons* (1889), 5 T.L.R. 677; 2 Digest 331, *138.*

(3) *Lake* v. *Simmons*, [1927] A.C. 487; 96 L.J.K.B. 621; 137 L.T. 233.

Appeal by the insurance company from a judgment of Atkinson, J., dated Feb. 13, 1940, and reported [1940] 1 All E.R. 514. The facts and arguments are fully set out in the judgment of MacKinnon, L.J.

H. U. Willink, K.C., and *Montague L. Berryman* for the appellants.

H. D. Samuels, K.C., and *R. Armstrong-Jones* for the respondent.

MacKinnon, L.J.: In Oct., 1936, Miss Thompson, who was arriving from America, made a proposal to the appellant company to issue to her a policy upon her motor car, which she was bringing from America. The company acceded to that proposal and issued to her a policy, dated Oct. 27, covering the car for 12 months from Nov. 8.

The material parts of the policy are these. The first refers to the proposal, and stipulates that it shall be the basis of the contract and be considered as incorporated. Then the policy continues as follows:

> Now this policy witnesseth that in consideration of the payment to the corporation of the premium stated in the schedule hereto in respect of the period set forth in the schedule, and during any further period in respect of which the corporation shall accept a premium, the corporation will, subject to the terms, exceptions and conditions contained herein, and of any endorsement hereon, indemnify the policyholder in respect of any automobile described in the schedule against . . .

Then in the schedule the car is described as a Buick limousine, and among the matters covered there is an indemnity to third parties unlimited. The matters against which an indemnity is promised are, first of all, sect. 1, loss or damage to the car, and sect. 2, third-party liability, and it is in this section that the most material passages occur:

> Third-party liability. (1) All sums which the policyholder shall become legally liable to pay in respect of any claim by any person (including passengers in the automobile) for loss of life or accidental bodily injury or damage to property . . . caused by, through, or in connection with such automobile . . .

Then subsect. (3) provides as follows:

> The insurance under this section shall also extend to indemnify in like manner any person whilst driving any automobile described in the schedule hereto on the

> order or with the permission of the policyholder, provided there is no other insurance subsisting under which such person may be indemnified, and that such person shall as though he were the policyholder observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply . . .

Then there is a proviso in two sections which I need not read in full, and then sect. 3 is headed: "Accidents to policyholder." It promises certain limited compensations in case the policyholder while in the car A and through a collision suffers death or total loss of both eyes. Sect. 4 is a promise of indemnity against medical expenses incurred by the policyholder or any occupant or driver of the car, limited to $100 in respect of any one person for any one accident. Then there follow conditions at the end. The only material one of those is condition 8, B which provides as follows:

> If any difference shall arise between the policyholder and the corporation, such difference shall be referred with all usual powers to two arbitrators mutually chosen or their umpire, or to one arbitrator if the policyholder and the corporation shall so agree, and an award shall be a condition precedent to any liability of the corporation or any right of action against the corporation.

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On Mar. 16, 1937, Miss Thompson was being driven in this car in London by Digby, her chauffeur, when a collision with another car occurred at cross-roads, and she sustained personal injury. She issued a writ against the owners of the other car, who were people named Bundy, claiming that the accident was caused by the negligence of the D driver of the other car. She added her chauffeur, Digby, as a defendant in that action, alleging in the alternative that the accident was caused by his negligence. The insurance company, pursuant to the promise of legal defence in the policy, assisted in pursuing that claim.

On May 4, 1938, that action was heard in the King's Bench Division. E du Parcq, J., found that both the drivers were negligent, and, therefore, on the doctrine of contributory negligence, Miss Thompson could not recover against the Bundys, but, as her chauffeur, Digby, had been negligent, she could recover against him. Finding, on the evidence, that her earnings during the brief period of her indisposition far exceeded F those which humbler people receive for a whole year's work, he awarded her £5,000 damages and the costs against Digby, and also against Digby half the costs which she had to pay to the Bundys, the other defendants. Those costs have been taxed at a sum of £693.

On Oct. 25, 1938, Digby issued a writ against the insurance company G claiming indemnity pursuant to sect. 2 (third-party liability). On Dec. 1, 1938, the company put in their defence. In that, the material defences were (i) that the policyholder was not a third party, and, therefore, Digby could not recover in respect of his liability for damages to Miss Thompson, and (ii) that, under condition 8, the award of arbi- H trators or an umpire was a condition precedent to the right of Digby or of any other third party to make a claim under the policy. On Jan. 31, Miss Thompson applied to stay the action, and on Feb. 3 a stay was ordered, the plaintiff paying the costs. Then on Apr. 5 Digby appointed his arbitrator. On Apr. 18, the company stated that their plea in the action was mere bluff, and that the arbitration clause did not apply to Digby's claim. They said that the arbitrators would have no jurisdiction, but they appointed their arbitrator without prejudice to that. On July 6, the arbitrators appointed Mr. Maxwell Fyfe umpire, and he, with the arbitrators sitting with him, heard the proceedings, and on Nov. 14, 1939, issued his award in the form of a special case, upon which special case the present questions arose. Those questions are formulated by the umpire in para. 17 of his award as follows:

> (1) Whether, on the facts and circumstances which happened as hereinbefore set forth, the claimant is entitled to avail himself of the arbitration provided for in the policy; (2) Whether, on the assumption that he is so entitled to avail himself of such arbitration, the claimant is entitled to recover the sum of £5,693 1*s.* 9*d.*

Those questions, of course, are quite separate and distinct. As regards the first question, I agree with the decision of the umpire and of ATKINSON, J., that a third party claiming pursuant to sect. 2 (3) of this policy is subject to condition 8, and that he must have an award of arbitrators before he can make any claim. The promise of indemnity to a third party in that subsection is as follows:

> The insurance under this section shall also extend to indemnify in like manner any person whilst driving any automobile . . . provided . . . that such person shall as though he were the policyholder observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply . . .

One of the conditions is condition 8. It is clear almost beyond argument that the terms of that condition can apply to a claim made by the third party under sect. 2, and the words at the end—namely, "an award shall be a condition precedent to any liability of the corporation or any right of action against the corporation"—emphasise the result or the position that a third party claiming under sect. 2 must get an award of arbitrators as a condition precedent to bringing any action. I think that the judgment of ATKINSON, J., on that first question is right.

Counsel for the appellants relied upon some decisions upon the question whether an arbitration clause in a charterparty was incorporated in a bill of lading, but any decision on the construction of a contract so totally different from the present one as a bill of lading and a charterparty seems to me to be of no value whatever.

The second point is more difficult, and that is at once manifest since there is a difference of opinion among my brethren and myself. I have come to the clear conclusion that on this question the decision of ATKINSON, J., was not correct. Sect. 2, which deals with third-party liability, is obviously inserted by reason of the necessity imposed on any owner of a motor car of having that type of insurance by the Road Traffic Act, 1930, s. 35. That obligation in that Act is stated to be an obligation to provide against third-party liability, words which are echoed in the sidenote to sect. 2 of the policy.

The whole argument for the respondent rests upon the fact that, in the operative words of sect. 2 (1), the words "any person" are used instead of "a third party." However, in my view, construing the policy as a whole, and having regard to the purpose and the nature of it, and, among other things, to the fact that this part of the policy is obviously based upon the requirements of the Road Traffic Act, 1930, s. 35, "any person" in this sentence means "a third party," and the passage ought to be construed as though the words "a third party" did appear there instead of "any person." This is a commercial document and the nature and purpose of this commercial document are of paramount importance in the construction of any part of it. It ought to be construed as a whole, and it is erroneous to construe any single sentence in it with that rigorous exactness which in so many cases has for so long defeated the purposes and intentions of testators.

If I am right in thinking that "any person" in that sentence means "a third party," who is a third party? The expression clearly contemplates three persons. Equally clearly the first of them must be the company, the second is the policyholder or the insured, and the third is some person other than the company or the insured. This exact question arose before LORD ROBERTSON in *General Accident, Fire & Life Assurance Corpn., Ltd.* v. *Watson* (1), though upon a policy expressed in slightly different language. LORD ROBERTSON came to the conclusion that the authorised driver, or the person driving with the consent of the policyholder, could not claim indemnity in respect of his or her liability to the policyholder who was injured by the driving of the car. I say that the policy was in slightly different terms, though issued by this same company. That is, I think, quite negligible. The substance of the policy and the true intent were exactly the same as in this case. It is not clear to me whether ATKINSON, J., meant that he did not agree with the judgment of LORD ROBERTSON or whether he distinguished it as depending upon the difference of language in the other policy. I think that there was no substantial difference in language, and the reasoning of LORD ROBERTSON would apply equally in this case. I confess that I prefer the view of LORD ROBERTSON to that which was expressed by ATKINSON, J., in this case.

If the respondent is right in his suggested construction that there may be a claim by a chauffeur for his liability for damaging his employer by his negligent driving, the most startling results would follow under this policy. I will mention one or two of them. This policy in its full terms covers, in sect. 1, loss or damage to the car, and, in sect. 2, third-party liability. It is only that insurance under sect. 2 which the owner of a motor car is bound under the Act of 1930 to possess, and he or she would comply with the requirements of the law if he or she took out an insurance only against third-party liability. The company, no doubt, if applied to for such a policy, would grant it, and, assuming that they were not to be liable for damage to the car, presumably would grant it at a smaller premium than if both classes of insurance were included. Having got a policy in those terms, the insured, if he was careful never to drive himself, and always to be driven by a chauffeur, would get the indemnity for loss or damage to the car without paying any premium for it, because, if an accident occurred by a collision with another car, that accident would be due either to the negligence of his own chauffeur or to the negligence of the other chauffeur. If it was due to the negligence of the other chauffeur, the insured would recover the damage to the car from the other car-owner. If it was due to the negligence of the insured's own chauffeur, then he would sue his chauffeur and recover against him. Then it is suggested that the chauffeur could claim to be indemnified in respect of the amount recovered against him. It is true that the company, faced with that claim, might possibly attempt to say that they were not liable, by reason of the proviso:

> Provided that the corporation shall not be liable in respect of damage to property belonging to or held in trust by or in the custody or control of the policyholder or any member of his family.

Nevertheless, I think that the reply to that contention, even if it could be said to be damage to property belonging to the policyholder, would be: "This is not a claim for damage to property. This is a claim for indemnity against a liability, and an indemnity against a liability is not damage to property." That is one remarkable result.

Another equally remarkable result is this. Sect. 3 promises to the policyholder certain limited amounts of compensation in the event of accidental bodily injury sustained by the policyholder—for instance, $2,500 for the loss of both eyes. Sect. 4 covers medical or surgical expenses incurred by the policyholder, and is limited to $100 in respect of any one accident. If Miss Thompson or any other policyholder by the negligence of her chauffeur had unhappily suffered the loss of two eyes, and had incurred medical expenses, she could at once claim against the company for $2,600. If, then, he or she brought an action against the chauffeur, the damages awarded against the chauffeur for his negligence might include thousands of pounds for the loss of the two eyes, and hundreds of pounds, if they had been incurred, in respect of medical or surgical expenses. Then under sect. 2 (3) the chauffeur would be entitled to claim the whole of those amounts against the company, and, so far as I can see, the company would have no defence, because it is impossible to conceive any plea under which the company could say: "You are claiming indemnity for thousands or hundreds of pounds in respect of the loss of your employer's eyes, and his medical expenses, and we have already paid him what we promised to pay him under sect. 3—namely, $2,600." There could be no legal ground on which they could be allowed to set off those sums already paid. These illustrations, I think, equally assist in showing that "any person" in sect. 2 (3) means a third party, and a real third party.

There is one other consideration. I observe from the judgment of du Parcq, J., that he held that Digby was negligent and liable, because in his evidence in the witness-box he admitted that he entered the cross-roads where the accident happened at 25 m.p.h. The judge said that out of his own mouth Digby thereby admitted that he was going too fast, and that that was negligent.

If under sect. 2 (third-party liability), the policyholder is to be entitled to recover—indirectly, of course—in respect of damages which she has recovered against her own chauffeur, there will be—I am not suggesting for a moment that it happened in this case—the gravest danger of the chauffeur or the driver deliberately admitting acts of negligence in his evidence in a collusive action. I do not know that I need pursue this matter further. I have indicated the main points which weigh with me. I think that, on this part of the case, the decision of ATKINSON, J., was incorrect. The result is that, in my opinion, the first question stated for the opinion of the court by the arbitrator ought to be answered in the affirmative, and the second question should be answered in the negative.

LUXMOORE, L.J.: The answer to each question depends, in my judgment, solely on the true construction of the contract of insurance, it being conceded that, although the claimant is not a party to that contract, under and by virtue of the provisions of the Road Traffic Act, 1930, s. 36 (4), as a person for whom indemnity is provided under Miss Thompson's contract of insurance, he has a statutory right to enforce that indemnity against the insurance company as if he had been a party to it. Sect. 36 (4) provides as follows:

> Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

It is admitted that the claimant, as a person authorised by Miss Thompson, the policyholder, to drive the motor car mentioned in the contract of insurance, is a person specified in the policy of insurance in respect of a liability which the policy purports to cover, although no admission is made as to the extent of the liability. The claimant can neither avail himself of arbitration proceedings nor be compelled to submit to them unless the contract of insurance so provides. The policy provides that the insurance company:

> . . . will subject to the terms, exceptions and conditions contained herein, and of any endorsement hereon, indemnify the policyholder in respect of any automobile described in the schedule against [(i) loss or damage thereto, to the extent stated in sect. 1 of the policy, (ii) third-party liability as stated in sect. 2, and (iii) accidents to the policyholder and other matters.]

For the purpose of considering the first question, it is sufficient to state that the section as to third-party liability is divided into three subsections. By subsect. (1), the policyholder is to be indemnified in respect of all sums which the policyholder "shall become legally liable to pay in respect of any claim by any person (including passengers in the automobile)" in respect of the matters specified in the subsection. Subsect. (2)

extends the policyholder's indemnity to liabilities incurred while personally driving another motor car not belonging to her as there specified. Subsect. (3) provides as follows:

> The insurance under this section shall also extend to indemnify in like manner any person whilst driving [the motor car to which the contract of insurance applies] on the order or with the permission of the policyholder, provided . . . that such A person [an authorised driver] shall as though he were the policyholder observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply . . .

That is subject to certain provisions which need not be stated. The words I have just quoted are repeated at the end of the section in refer- B ence to the personal representatives of any person entitled to indemnity under it. The policy includes certain conditions which are numbered 1 to 11. Of these, the material condition is condition 8, which provides as follows:

> If any difference shall arise between the policyholder and the corporation, such difference shall be referred with all usual powers to two arbitrators mutually chosen C or their umpire, or to one arbitrator if the policyholder and the corporation shall so agree, and an award shall be a condition precedent to any liability of the corporation or any right of action against the corporation.

It is said that a person entitled to indemnity under sect. 2 (3) cannot avail himself of condition 8, because there is no mention in it of any D persons other than the policyholder and the insurance company, and that, for this reason, its provisions cannot apply to an authorised driver.

It is to be observed that by sect. 2 (3) there is placed on such a person an obligation to " observe, fulfil, and be subject to the terms, exceptions and conditions of this policy so far as they can apply " as though that E person were the policyholder. Plainly, the policyholder cannot, in case of difference between herself and the insurance company, recover anything unless an award shall first have been made in arbitration proceedings under condition 8. That is both a term and a condition of the policy. If the authorised driver is to be treated as though he were the F policyholder, there is no difficulty in substituting " the authorised driver " in the appropriate case for " the policyholder." The limitation of the policyholder's right of action in the first instance to arbitration proceedings is a subtraction from the policyholder's rights to have recourse to the court, and it would be strange if an authorised driver should not be G subjected to the same limitation. I think, however, that any possibility of doubt with regard to the availability of arbitration proceedings to an authorised driver is completely dispelled by the generality of the last words of condition 8:

> . . . an award shall be a condition precedent to any liability of the corporation H or any right of action against the corporation.

If it had been intended to restrict the availability of arbitration proceedings to the policyholder, one would expect that the appropriate words would have been inserted. Moreover, in considering this clause, the court is entitled to bear in mind that the insertion of an arbitration clause in insurance contracts is something which is required by the insurance company, and not by the policyholder. There is no reason why the authorised driver should be treated differently, and allowed to have free and unfettered access to the court in respect of matters arising under the policy, while the policyholder's right of access is restricted.

In the course of his strenuous and skilful argument, counsel for the appellants referred to a number of cases, and in particular to *Hamilton & Co.* v. *Mackie & Sons* (2). With all respect to that part of his argument, the cases have no real bearing on the construction of the provisions of this policy, which are the material to be considered in arriving at a conclusion upon the first question. I am satisfied that the first question should be answered in the affirmative, and I am happy to find myself in complete agreement with Mr. Maxwell Fyffe, ATKINSON, J., and MACKINNON and GODDARD, L.JJ., on this point.

I regret, however, that I am unable to agree with MACKINNON and GODDARD, L.JJ., as to the answer to be given to the second question. On that question, I find myself in agreement with Mr. Maxwell Fyffe and ATKINSON, J. Again, the answer to the question depends purely on the construction of the material part of the policy. When I say the material part of the policy, I mean the material part having regard to the whole of the policy, because, of course, the whole of the contract of insurance has to be considered in arriving at any solution of a question of its true construction. The material part is sect. 2 (3). It is common ground that the claimant was authorised by Miss Thompson to drive her motor car, and that, while he was driving the car, he incurred a legal liability to Miss Thompson. Why is he not entitled to be indemnified by the insurance company in respect of that liability ? By sect. 2 (1), the policyholder is to be indemnified by the insurance company in respect of :

> All sums which the policyholder shall become legally liable to pay in respect of any claim by any person (including passengers in the automobile) [in respect of the matters expressly defined].

This can properly be described as being an indemnity in respect of third-party claims. If the words "any person" are taken alone, they include the whole world. The only limitation on them is that the person must have a legal claim against the policyholder, and it is by reason of this limitation that the policyholder is herself excluded. The words "any person" are not synonymous with any third party, but are, with the limiting words which I have read, the definition, for the purposes of the policy, of the words "third-party liability" in the margin of the policy. It is to be observed that the words "any person" appear frequently in this policy, and that, in one place, at any rate, it was thought necessary to add the words "other than the policyholder" in order to prevent their including the policyholder. Quite plainly, in the last paragraph of sect. 2 (3) the words "any person" include the policyholder, for it is in that paragraph that the indemnity given to the policyholder, among others, is extended to her legal person representatives in the case of her death. As I read sect. 2 (3), the authorised driver is to be indemnified in like manner as the policyholder under sect. 2 (1). This appears to be equivalent to a direction to substitute the authorised driver for the policyholder in sect. 2 (1), and, if this is done, the indemnity conferred on the authorised driver is in respect of: "All sums which the authorised driver shall become legally liable to pay in respect of any claim by any person including passengers in the automobile."

It seems to me that the policy is providing two separate indemnities, one for the policyholder and the other for the authorised driver, and that each indemnity is to be co-extensive, and is to cover any legal liability to pay any sums in respect of any claim by any person. In my opinion, there is no exception of any legal liability of an authorised driver to the policyholder, and I can find no justification for reading the words "any person" as synonymous with "third party" for the purpose of excluding the authorised driver's legal liability to the policyholder, which admittedly exists, by construing the words "third party" with reference to the contract of insurance, and not with reference to the particular indemnity to which the words relate.

Reliance was placed upon *General Accident, Fire & Life Assurance Corpn., Ltd.* v. *Watson* (1), a decision of the Scottish courts in respect of a policy issued by the insurance company in a form different from that of the policy in the present case. Our attention was called to the judgment of LORD ROBERTSON in that case. The main difference between the policy in that case and that in the present is that in the former the words conferring the indemnity upon the authorised driver were introduced by the words "in terms of and subject to the limitations of and for the purposes of this section." ATKINSON, J., I think, sought to distinguish the present case from *Watson's* case (1) by reason of the presence of these words. Personally, although I feel some considerable doubt as to their precise meaning, I do not think that they are sufficient for that purpose. If, as I think, they are not, I find myself unable to agree with the decision of LORD ROBERTSON. In my judgment, Mr. Maxwell Fyffe and ATKINSON, J., answered the second question correctly when answering it in the affirmative. I need hardly say that I express this opinion with some hesitation, having regard to the fact that MACKINNON and GODDARD, L.JJ., take the contrary view. I would dismiss the appeal with costs.

GODDARD, L.J.: On the first point which the special case raises, I am of the same opinion as MACKINNON and LUXMOORE, L.JJ., and ATKINSON, J., and need add nothing except to express some surprise and regret that, in view of the plea which they raised in the action, an insurance company, without any regard for its reputation, should have thought fit to take it in the arbitration. On the second point, I am in complete agreement with MACKINNON, L.J. To arrive at a true construction, one must look at the policy as a whole, and must have regard to what I may call its structure. It is divided into sections. Sect. 2 insures the policyholder against third-party claims—that is, claims which arise consequent upon the negligent driving of the car by the insured—and, of course, would include claims which arose when she was being driven in the car by her servant. Apart from the extension clause, it is clear that she gets no indemnity in respect of personal injuries which she may sustain through her own or her servant's driving other than that which is given for specific injuries by another section of the policy. In my opinion, the words which we have now to construe have not the effect of granting a separate insurance to an authorised driver. They extend the cover granted to the insured to the case of a person whom she allows to drive the car, although not on her behalf or for her purposes. They enable her to lend the car without committing a breach of the provisions of that part of the Road Traffic Act, 1930, which deals with insurance against third-party risks. Taking the policy as a whole, I think that it is impossible so to construe it as in effect to give or award an additional benefit to the policyholder—for that is what it comes to—as is here contended. Although, by sect. 3, compensation to the policyholder for personal injury is limited to specific sums for specific injuries, the result of the contention would be that, if the car were being driven by the policyholder's servant or friend when the accident happened, she would get from the insurance company, not only these sums, but also all the damages, including medical expenses (which again are limited in amount in the policy), which she might be awarded, and get them by the simple expedient of suing the driver. This construction would cast on the insurance company a far heavier obligation than the policy, taken as a whole, ever contemplated, in my opinion. In this respect, I must call attention to the words of Viscount Sumner in *Lake* v. *Simmons* (3), at p. 509:

> Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure.

In my opinion, all these matters point irresistibly to the conclusion contended for by the insurance company.

I can see no difference in substance between the policy in this case and that which Lord Robertson had to consider in the Court of Session in *Watson's* case (1). The same arguments appear to have been adduced before him as here, especially as to the meaning to be given to the words "any person." I find the reasoning of Lord Robertson in rejecting the claim quite convincing, and I do not feel that I can add anything to them.

Appeal allowed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellants); *Walter, Burgis & Co.* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

WIMBORNE AND CRANBORNE RURAL DISTRICT COUNCIL *v.* EAST DORSET ASSESSMENT COMMITTEE.

[COURT OF APPEAL (MacKinnon, Clauson and Luxmoore, L.JJ.) **June 7, 13, 1940.**]

Rates and Rating—Agricultural hereditament—Land partly used for purposes of motor-cycle track racing but otherwise used as pasture land—Whether separately rateable hereditament—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 2 (2).

A. occupied a farm comprising 11 fields, which, as an agricultural hereditament, did not appear in the valuation list. At all material times, one of the fields was used by A. for pasturing cattle in connection with his business as a farmer, but, on 2 afternoons in 1937 and on 4 afternoons in 1938, the field was used by a motor cycle and light car club for the holding of motor-cycle grass track race meetings, when the charge for admission was 1*s.* per head, and in addition charges were made for motor cars, motor cycles and bicycles taken into the field or parked in the adjoining field. On these occasions, the club took £356 in gate money, after allowing for tax. In addition, the club obtained some receipts by letting the right to supply refreshments. Certain money received by the club on these occasions was expended in prize money and expenses. The club paid to A. for the use of the field the sum of 10*s.* per 100 spectators, and during 1938 the sum of £42 14*s.* was so paid. A proposal was made by the rating authority to amend the valuation list by the insertion therein of the field as a separately rateable hereditament, on the grounds that it was occupied and used as a racecourse, that it was not land used as pasture ground only, and that it was not agricultural land within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2).

HELD: the field was a separately rateable hereditament, and, on the facts found, had been used as a racecourse within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2).

Decision of Divisional Court ([1940] 1 All E.R. 289) *reversed.*

[**EDITORIAL NOTE.** Agricultural land means any land used as arable, meadow or pasture ground. This means that the land must be used mainly for these purposes, although, if there has been a casual and unimportant use for a commercial purpose, the maxim *de minimis non curat lex* will apply and will preserve the land in the category of agricultural land. The Court of Appeal, differing from the Divisional Court, have found, however, that the field in question had been used as a racecourse within the meaning of the Act, since notoriously the most perfect racecourses were used only on two or three occasions in each year.

AS TO DEFINITION OF AGRICULTURAL LAND, see HALSBURY, Hailsham Edn., Vol. 27, pp. 378, 379, para. 809; and FOR CASES, see DIGEST, Vol. 38, pp. 458, 459, Nos. 230-234.]

Cases referred to:

(1) *Jarvis* v. *Cambridgeshire Rural Assessment Area Assessment Committee, Dawson* v. *Cambridgeshire Rural Assessment Area Assessment Committee,* [1938] 4 All E.R. 186; Digest Supp.

(2) *Tattersall* v. *Marlborough Area Assessment Committee,* Unreported.

APPEAL by the rating authority from a judgment of the King's Bench Divisional Court, dated Jan. 18, 1940, and reported [1940] 1 All E.R. 289. The facts are fully set out in the judgment of MACKINNON, L.J.

Sydney Turner, K.C., and *J. Scott Henderson* for the appellants.

R. M. Montgomery, K.C., and *G. D. Squibb* for the respondents.

MacKinnon, L.J.: This is an appeal from a decision of the Divisional Court on a special case stated by the appeal committee of the Dorset quarter sessions. That special case was stated pursuant to the provisions of the Rating and Valuation Act, 1925, s. 31 (5), which provides as follows:

> On the determination of an appeal under this section any party to the appeal may, if dissatisfied with the decision of the court as being erroneous in point of law, make an application . . . to have a case stated for the opinion of the High Court on the point of law, and the court [the court of quarter sessions] shall, unless it is of opinion that the application is frivolous, state a case accordingly.

The case arises out of the legislation which exempts agricultural hereditaments from being rateable. One Atkins was the occupier of a farm of some 150 acres at Corfe Mullen divided into 11 fields. These fields had been previously treated as agricultural land exempt from rates. The special case in its material parts is as follows. Para. 3 states:

> On Mar. 18, 1938, the rating authority made a proposal for the amendment of the valuation list for the parish of Corfe Mullen by the insertion therein of a hereditament consisting of one of the said 11 fields numbered and described as follows: Description of property: Land used for the purposes of and in connection with motor-cycle track racing.

Then the situation is given, and "Estimated extent: 17 acres," and then come the suggested gross and net values. In Nov., 1938, the assessment committee rejected this proposal, upon which the rural district council appealed to quarter sessions. Then para. 6 of the case sets out the following facts:

> The said appeal came on for hearing before the committee of the justices of the said county appointed by quarter sessions for the purposes of the Rating and Valuation Act, 1925, and on Jan. 4, 1939, when the following facts were admitted or proved: (*a*) Save as hereinafter mentioned the field the subject of the said proposal was at all material times used by the said Atkins for the purpose of pasturing cattle in connection with his business as a farmer carried on on the Home Farm aforesaid; (*b*) On 2 afternoons in the year 1937 and on 4 afternoons in the year 1938 the said field was used by the Ringwood Motor Cycle and Light Car Club for the holding of motor cycle grass track race meetings. The programme of the club described the track on which the races were held as a "course"; (*c*) On the 4 days in the year 1938 on which the said field was used for motor-cycle racing the attendances were: May 22, 2,400; June 26, 2,350; Aug. 28, 1,600; Sept. 25, 2,200; (*d*) The charge for admission on the above occasions was 1*s.* per head and, in addition, charges were made for motor cars, motor cycles and bicycles taken into the field or parked in the adjoining field. On the said occasions the club took £356 in gate-money after allowing for tax. In addition, the club obtained some receipts by letting the rights to supply refreshments. The money received by the club on the said occasions was expended in prize money and expenses; (*e*) The track used by competitors was marked out by means of fencing which was put up and taken down by the said Atkins, some assistance being given by some members of the club. The position of the track was moved slightly at the 4 different meetings; (*f*) The said club paid to the said Atkins for the use of the said field (including the erection and removal of fences and any necessary cleaning and tidying of the said field and repairs to fences and an occupation road) the sum of 10*s.* per hundred spectators. During the year 1938, the sum of £42 14*s.* was so paid; (*g*) The effect of using the said field for the purpose of motor-cycle racing was to impair the grass to some extent, especially at the corners of the track where bare patches were left, but not substantially to affect the use of the said field as pasture land in connection with the farm aforesaid.

Then para. 7 and para. 8 set out the respective contentions of the parties. I need not read them, but they are in substance two. The ratepayer contended that the field was not a separately rateable hereditament, and that it was land used only as pasture ground, and not as a racecourse. The rating authority resisted both those contentions.

The committee of quarter sessions allowed the appeal and stated this case. The question for the opinion of the court is set out in para. 10 as follows:

> The question upon which the opinion of the court is desired is whether, on the facts proved or admitted, we arrived at a correct decision in point of law.

Upon the minor question whether this field was a separately rateable hereditament the Divisional Court expressed no opinion. I am clearly of opinion that it was. This is one of the 11 fields into which the farm is stated to be divided. We must assume that it is bounded by hedges, or other defined boundaries, and if, from the nature of the user of such a field, it is not within the definition of "agricultural land," I can see no reason why, because it is held by the occupier along with other fields which are within the definition, it should not be treated as a separately rateable hereditament.

Upon the question stated by quarter sessions—namely, whether, on the facts found or admitted, they arrived at a correct decision in point of law—the Divisional Court replied in the negative and allowed the appeal.

The question involves a consideration of the definition of the words "agricultural land" in the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), which, so far as material, provides as follows:

> "Agricultural land" means any land used as arable meadow or pasture ground only . . . but does not include land occupied . . . or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse.

The committee of quarter sessions in effect found that, though this field was, and to a large extent still is, "meadow or pasture ground," it is not "used as meadow or pasture ground only," and, secondly that, within the exception, it is "land used as a racecourse." The sole question for the Divisional Court and for this court is whether or not, upon the facts stated, that is an erroneous decision in point of law. The Divisional Court held that it was erroneous. As I understand the judgment of Lord Hewart, L.C.J., he based that view upon the ground that the land was only [p. 291]:

> . . . on particular and comparatively rare occasions used for the purposes of a racecourse.

He also referred [p. 292] with emphasis and approval to some document in which the assessment committee expressed their view that:

> . . . the very occasional user for the purpose of motor-cycle racing is not sufficient to take the hereditament out of the category of agricultural land. . . .

I do not know how this document came before the Divisional Court. They were concerned with a special case, and they were limited to the terms of that case, and no other documents were annexed to it. I infer that Lord Hewart, L.C.J., must have referred to it only as expressing the argument which found favour with him.

The material parts of the definition section are as follows :

> Land used as arable meadow or pasture ground only . . . but does not include . . . land used as a racecourse.

It is material to note that the words "mainly or exclusively for the purposes of," in the preceding sentence, referring to "purposes of sport or recreation," are not repeated in the simple words "land used as a racecourse." Lord Hewart, L.C.J., emphasises the user as being "on particular and comparatively rare occasions," and approves the argument which spoke of "the very occasional user for the purposes of motor-cycle racing." This consideration is only as to the number of occasions in the year of such user. Having regard to the subject-matter, however, this is surely in itself a fallacious consideration. Notoriously all "racecourses" of the most perfect type are only used as such on a few occasions in a year. I have an idea that Goodwood and Ascot are each used only once a year.

There may be another aspect of the casual and unimportant user as a racecourse—for instance, if the farmer occasionally allowed youths with motor-cycles to use this field for improvised races among themselves. On the facts found, however, the user here was much more elaborate and organised. At the four meetings in 1938, the average attendance at each was about 2,140 people. The club holding the meetings took over £350 in gate-money alone, and paid to the farmer over £42 as rent, in addition to payments "for cleaning up the field, repairing fences and repairing the occupation road." It is also not without materiality that the club paid entertainment tax, which it exacted from the spectators who attended, in addition to the gate-money.

I repeat that the question propounded in the case is as follows :

> Whether on the facts proved or admitted, [the court of quarter sessions] arrived at a correct decision in point of law.

Put otherwise, that question must be whether the facts found afforded evidence on which the tribunal could properly find as a fact that this field was used as a racecourse within the meaning of the section. If the facts found showed only such casual and unimportant user that the legal maxim *de minimis non curat lex* applied, no doubt the court ought to hold that there was no evidence on which the quarter sessions could so find. However, if the user is so substantial that the maxim *de minimis* cannot apply, I do not see how this court can hold that there was no evidence on which quarter sessions could come to the conclusion to which they did.

One other consideration was referred to by Lord Hewart, L.C.J., [p. 292] :

> The very occasional user of that particular field for the purposes of motor-cycle

racing is . . . such as "not substantially to affect the use of the field as pasture land in connection with the Home Farm.

With all respect, I doubt if that is a material consideration. In the first place, I imagine that it must be true that, except on the occasion of rare meetings, a regular and undoubted racecourse like Ascot or Goodwood could be substantially used as pasture. Secondly, I conceive that the policy of the legislature is that, if the farmer uses his land for commercial profit from other than agricultural operations, it is right that he should, in respect of that user and that profit, be subject to the burden of rates. In the Divisional Court, Lord Hewart, L.C.J., referred to *Jarvis* v. *Cambridgeshire Rural Assessment Area Assessment Committee* (1) and *Tattersall* v. *Marlborough Area Assessment Committee* (2), two other special cases which had been before the Divisional Court. They were concerned with other and different facts, and they seem to me to be of no assistance upon the present case. In the result, I am unable to agree with the decision of the Divisional Court, and I think that this appeal must be allowed.

Clauson, L.J.: I have had the advantage of reading the judgment which has just been delivered by MacKinnon, L.J., and I agree with it, and find it unnecessary to add anything.

Luxmoore, L.J.: I also agree with it, having had the same opportunity.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Peacock & Goddard*, agents for *Luff, Raymond & Williams*, Wimborne Minster (for the appellants); *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re GORDON, WATTS *v.* RATIONALIST PRESS ASSOCIATION, LTD., AND MORISON KEMP.

[Chancery Division (Bennett, J.), **May 31, June 4, 5, 1940.**]

Executors—Order of application of assets—Sum given to executors in trust to pay debts, etc.—Whether variation of order prescribed in Act—Administration of Estates Act, 1925 (c. 23), *s.* 34 (3), *Sched. I, Part II, paras.* 3, 4, 8.

The will of a testatrix, after providing for a legacy of jewellery, contained the following clause: "I give to the executors the sum of £50 in trust thereout to pay my debts and funeral and testamentary expenses and to pay any balance remaining to the Rationalist Press Association, Ltd., to be applied to the general purposes of the said association and the receipt of the secretary for the time being will be a sufficient discharge for my executors." The legacy of the jewellery lapsed, and the questions to be determined were whether the defendant association took the residue of the estate or the residue of the legacy of £50, and whether the debts and funeral and testamentary expenses were payable primarily out of that sum or out of the undisposed-of estate of the testatrix:—

Held: (i) there was nothing in the will to constitute the defendant association the residuary legatees.

(ii) the testatrix had merely made a bequest which came within the Administration of Estates Act, 1925, Sched. I, Part II, para. 4, which was not of itself such a sufficient intention as required by para. 8 to alter the order laid down by the schedule. The debts and funeral and testamentary expenses were, therefore, payable out of the undisposed-of estate of the testatrix.

[**EDITORIAL NOTE.** The Administration of Estates Act, 1925, Sched. I, Part II, provides for the order of the application of the assets of the deceased where the estate is solvent. Para. 8 provides that the order may be varied by the will. The first question in this case is, therefore, whether the gift of £50 for payment of debts and funeral and testamentary expenses is such a variation within the meaning of the schedule. This question being answered in the negative, the order laid down in the schedule applied, and, a part of the estate being, in the events which had happened, undisposed of, the debts and the funeral and testamentary expenses were primarily payable out of the undisposed-of property.

As to Order of Application of Assets, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375-377, para. 704; and for Cases, see DIGEST, Supp., Executors and Administrators, Nos. 5908a-5919a.]

Cases referred to:

(1) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; Digest Supp.; 99 L.J.Ch. 107; 142 L.T. 111.

(2) *Boys* v. *Morgan* (1838), 9 Sim. 289; 44 Digest 548, *3653*; 7 L.J.Ch. 247; *affd.*, 3 My. & Cr. 661.

(3) *Re Littlewood, Clark* v. *Littlewood*, [1931] 1 Ch. 443; Digest Supp.; 100 L.J.Ch. 243; 144 L.T. 718.

(4) *Re Lamb, Vipond* v. *Lamb*, [1929] 1 Ch. 722; Digest Supp.; 98 L.J.Ch. 305; 141 L.T. 60.

(5) *Re Petty, Holliday* v. *Petty*, [1929] 1 Ch. 726; Digest Supp.; 98 L.J.Ch. 207; 141 L.T. 31.

(6) *Re Atkinson, Webster* v. *Walter*, [1930] 1 Ch. 47; Digest Supp.; 99 L J.Ch. 35; 142 L.T. 129.

Adjourned Summons to determine what interest the defendant association took under the will of the testatrix, Kathleen Hester Gordon, and out of what part of the estate the debts and funeral and testamentary expenses were payable. The second question was similar to that discussed in *Re Kempthorne, Charles* v. *Kempthorne* (1). The will was proved on July 3, 1939, by Charles Albert Watts, the sole surviving executor, who was the chairman and founder of the defendant association. The material provisions of the will are set out in the judgment.

E. M. Winterbotham (*Wilfrid M. Hunt* with him) for the plaintiff, the executor.

A. H. Droop for the defendant association.

J. B. Richardson (for *T. Cunliffe* on war service) for the second defendant.

Winterbotham stated the facts.

Droop: It is contended that the words "any balance remaining" mean balance from the estate, and not from the £50. By appointing executors, the testatrix vested the whole of her estate in the executors. She wished that her funeral and testamentary expenses should be paid —that is with the gift of the £50—and her direction to the executors "to pay any balance remaining" to the Rationalist Press Association, Ltd., meant either to give the defendant association nothing, in which case she died intestate as to her whole estate, or to give them the "balance remaining" of the estate—namely, the whole of the residue. It is suggested that the gift in trust of the £50 refers only to the first part of the clause, which is to pay debts and funeral and testamentary expenses, and that otherwise she has not disposed of her property. [Counsel referred to *Boys* v. *Morgan* (2).] The effect of the application of the assets according to the Administration of Estates Act, 1925, Sched. I, Part II, is to take this legacy out first and then to throw the debts and funeral and testamentary expenses on the residuary estate, leaving this £50 to the legatee. The effect of the judgment of MAUGHAM, J., in *Re Kempthorne, Charles* v. *Kempthorne* (1) is that para. 3 and para. 4 cannot operate where there is a gift of residue. MAUGHAM, J., was overruled by the Court of Appeal, but not on para. 3. It is admitted that the application of assets where the estate is solvent yields to a contrary intention, but all that the testatrix has done is to appropriate a sum for the payment of debts. There are not sufficient words in the will to alter the statutory application. What differentiates this case is that the testatrix died leaving property undisposed of by will and property answering to para. 3 only. *Re Littlewood, Clark* v. *Littlewood* (3) is distinguished, because it contained a residuary gift, and did not merely constitute property under para. 3. The testatrix has done nothing in the will except constitute property in accordance with para. 3, and there is no further provision in the will which alters the order of application as laid down by the schedule. [Counsel referred to *Re Lamb, Vipond* v. *Lamb* (4), *Re Petty, Holliday* v. *Petty* (5) and *Re Atkinson, Webster* v. *Walter* (6).]

Richardson: It is the clear intention of the testatrix that the debts and funeral and testamentary expenses are to be paid out of the £50. Clauses 3 and 4 of the schedule do not apply to general legacies, and the Rationalist Press Association, Ltd., are entitled to no more than the balance of the £50 after payment of these debts and funeral and testamentary expenses. Sect. 34 (3) of the Act states that the order in the schedule is subject to the provisions in the testator's will, and it is argued that the statement that, if the will states that the debts are to be paid out of Whiteacre, they should be paid out of undisposed-of property is incorrect. There is a clear intention to vary the statutory order. [Counsel referred to *Re Petty, Holliday* v. *Petty* (5), *Re Atkinson, Webster* v. *Walter* (6), *Re Littlewood, Clark* v. *Littlewood* (3) and *Re Kempthorne, Charles* v. *Kempthorne* (1).]

BENNETT, J.: The testatrix made her will on Oct. 16, 1913, and she died on Feb. 19, 1939. She appointed executors; she has given directions as to the cremation of her body, the disposal of her ashes, and the payment of debts and funeral and testamentary expenses.

She disposed of a necklace in favour of a Mrs. Booth who predeceased her, and, after those dispositions, the will concludes as follows :

> I give to the executors the sum of £50 in trust thereout to pay my debts and funeral and testamentary expenses and to pay any balance remaining to the Rationalist Press Association, Ltd., to be applied to the general purposes of the said association and the receipt of the secretary for the time being shall be a sufficient discharge for my executors. A

Those are all the dispositions of property made by the testatrix in her will. The estate of the testatrix was and is solvent.

The first question asked was whether, on the true construction of the will of the testatrix, her residuary estate was given to the Rationalist Press Association, Ltd., or whether it was undisposed of. On that B question I decided that the residuary estate was undisposed of and that all that the testatrix had disposed of was the balance of the £50 after paying the debts and funeral and testamentary expenses.

The second question which arises for decision is as follows :

> If what is given to the said defendants is only the balance of the sum of £50, C whether the testatrix's debts and funeral and testamentary expenses are primarily payable out of that sum or whether the same ought to be paid out of the undisposed-of estate of the testatrix.

The answer to that question depends upon the true construction and effect of the Administration of Estates Act, 1925, s. 34 (3) and D Sched. I, Part II, of that Act. The Administration of Estates Act, 1925, s. 34 (3), provides as follows :

> Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration E expenses, debts and liabilities payable thereout in the order mentioned in Part II of the first schedule to this Act.

The estate of this testatrix was and is solvent. Sched. I, Part II, provides as follows :

> Order of application of assets where the estate is solvent. 1. Property of the F deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. 2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid. 3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts. 4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) G subject to a charge for the payment of debts. . . . 8. The following provisions shall also apply—(*a*) The order of application may be varied by the will of the deceased. (*b*) This part of this schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

The second question has to be answered in the light of those statutory provisions and of the provisions, which I have read, contained in the H testatrix's will. It is said, and I think truly, that there has been no case which decides what the interpretation of the statutory provisions is, and what their effect is upon such a will as is the subject-matter of the present summons. The provisions of the section have been considered in several cases to which my attention has been drawn.

One of them is the decision of the Court of Appeal in *Re Kempthorne, Charles* v. *Kempthorne* (1). That was a case in which the Court of Appeal reversed the decision of MAUGHAM, J., and upon what MAUGHAM, J., said in that case Mr. Droop, who has argued on behalf of the Rationalist Press Association, Ltd., has mainly relied. *Kempthorne's* case (1) was a case in which the testator had disposed of his freehold and copyhold property in favour of his brother, and then the will provided as follows :

> As to all my leasehold property and all my personal estate and effects including my stocks and shares and all money due to me on debentures and mortgages of or to which I shall be possessed or entitled at the time of my death subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and the duty on any legacies bequeathed free of duty the same shall be divided into 7 equal parts and I bequeath the same as follows. . . .

As regards 3 equal seventh parts of the property so given, there was a lapse, owing to the death of two of the legatees in the testator's lifetime, and the question which arose was whether the testator's debts and funeral and testamentary expenses should be paid out of the lapsed shares in exoneration of the shares which had not lapsed. MAUGHAM, J., came to the conclusion that the debts and funeral and testamentary expenses ought to be paid out of the shares which had lapsed in exoneration of the shares which had not lapsed. The ground upon which he decided the case is to be found at p. 278. He read para. 1 and para. 2 of the schedule, and then he proceeded as follows, at p. 278 :

> Then come two further paragraphs, which I think are somewhat difficult to understand, in relation to the subject-matter. The third item of property is " Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts." The fourth is " Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts." Now in both of those cases it is to be noticed that the legislature is assuming that the testator by his will has specifically appropriated in one case, or devised or bequeathed in the other, property for the payment of debts ; or that he has charged with payment of debts specific property, or some property, under a general description, or devised or bequeathed property subject to a charge for payment of debts, and I cannot help concluding that those two paragraphs mean that the fact that the testator has done one of those things is not *per se* to constitute, to use the words of sect. 34 (3), a provision in the will which operates to alter the order of application which is specified in Part II of the schedule.
>
> In the present case, there is, I think, an indication that the leasehold property and the personal estate and effects of the testator, including his stocks and shares, etc., are being bequeathed subject to a charge for payment of debts ; for a gift of property subject to payment of debts is a gift of property subject to a charge for the payment of debts. Accordingly this property of the deceased is, I think, being subjected to a charge for payment of debts within the meaning of the phrase as contained in para. 4 of Part II, and I conceive that that is not to affect the circumstance that under para. 1 of Part II the property of the deceased undisposed of by will is primarily to be applied in payment of these particular liabilities, funeral and testamentary expenses and debts.

That was the ground upon which MAUGHAM, J., based his decision.

The case went to the Court of Appeal, where his decision was reversed. The ground upon which it was reversed clearly appears from the judgment of LAWRENCE, L.J., who said, at p. 299 :

> I agree with MAUGHAM, J., that the introduction into the schedule of the third and fourth items of property (to be applied in that order) might in some cases create

> a difficulty in determining the true effect of the words "subject to the provisions, if any, contained in his will," in sect. 34 (3), as an express provision contained in a will that property should be appropriated or be subjected to a charge for the payment of debts would *prima facie* appear to indicate an intention inconsistent with the order of application contained in the schedule which places property undisposed of and property included in a residuary gift as the first and second items to be resorted to for the payment of expenses and debts. I do not, however, agree with the learned judge that this difficulty arises in the present case; or that in the present will any property is bequeathed subject to a charge for the payment of debts within the meaning of para. 4 of the schedule.

Upon that ground, LAWRENCE, L.J., came to the conclusion that the foundation of the judgment of MAUGHAM, J., was incorrect, there being no property in the will bequeathed subject to a charge for payment of debts within the meaning of para. 4 of the schedule. The judgment of RUSSELL, L.J. [at p. 301] is to the same effect. There is not a suggestion, nor a hint of a suggestion, in any of the judgments of the members of the Court of Appeal in that case that they would have disagreed with MAUGHAM, J., if they had been in agreement with him as to the foundation of his conclusion, the foundation being that the testator had either specifically appropriated or devised or bequeathed property for the payment of debts or had charged property with or devised or bequeathed property subject to a charge for the payment of debts.

In the present case it is clear that the testatrix has either bequeathed property for the payment of her debts or has bequeathed property charged with the payment of her debts. She has made no other disposition of her property. The facts of the case plainly fall within the reasoning of MAUGHAM, J., with which, if I may respectfully say so, I entirely agree. Where a solvent testator by his will has made a disposition of property which falls either within para. 3 of the schedule or within para. 4, and has made no other disposition of his property and has not otherwise indicated his intentions, there seems to me to be no grounds for a conclusion that such a testator has intended to vary or interfere with or alter the order in which the statute has said that assets are to be applied for the payment of debts and funeral and testamentary expenses.

As I have said, this testatrix has either made a provision in accordance with para. 3 or in accordance with para. 4 of the schedule. I do not think it matters which. My own view is that she made a bequest which comes within the terms of para. 4, otherwise she has died completely intestate without having made any disposition whatever of the property of which she died possessed. I can see nothing in her dispositions which alters the order in which the statute says that the assets are to be applied. The result is that, in my judgment, the answer to the second question is that the testatrix's debts and funeral and testamentary expenses ought to be paid out of the undisposed-of estate of the testatrix.

Solicitors: *Ellis, Munday & Clarke* (for the plaintiff and for the first defendants); *Ruston, Clarke & Ruston* (for the second defendant).

[*Reported by* I. G. R. MOSES, *Barrister-at-Law.*]

IMPERIAL SMELTING CORPORATION, LTD. *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LTD. THE KINGSWOOD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Goddard, L.JJ.), **June 17, 18, 1940.**]

Contract—Impossibility of performance—Frustration—Charterparty—Unexplained accident to ship—Onus of proof that accident not due to negligence—Bursting of auxiliary boiler.

A ship was chartered to load a cargo, but on the day before she should have proceeded to her berth an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage. The cause of the explosion could not be definitely ascertained, and, of three possible explanations, only one would have imported negligence on the part of the shipowners. The charterers claimed damages from the shipowners for failure to load a cargo. At the time of the accident, the ship was not an " arrived " ship, and, therefore, neither the express warranties nor the exceptions clauses in the charterparty had attached. The question thus arose whether, on a plea of frustration of the contract, the party setting up the plea had to prove that the frustration was not due to his negligence or whether the party denying the frustration must affirmatively prove negligence on the part of the party setting up the plea :—

HELD : a party *prima facie* guilty of a failure to perform his contract cannot escape under the plea of frustration unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.

Decision of ATKINSON, J. ([1940] 2 All E.R. 46) *reversed.*

[**EDITORIAL NOTE.** Although the cases on frustration go back to the early part of last century, if not earlier, the full consideration of the doctrine is almost wholly confined to cases decided since the beginning of the Great War. The doctrine has been based on two alternative theories, (i) that the foundation of the contract has disappeared, or (ii) that a term to that effect would be implied in the contract. It is essential that the frustration should not be a self-induced frustration, and this would exclude a frustration brought about by the negligence of the party setting up the plea. Up to this point, no difficulty arises, but, when it comes to be asked whether the party setting up the plea must disprove his own negligence or whether the other party must prove the negligence of the party setting up the plea, there is an absence of direct authority, and that is the difficulty which arises in the present case. After a consideration of the various cases in which the burden of proof of negligence has arisen, the judge in the court of first instance based his final decision upon the fundamental principle that it is for the plaintiff to prove his case, but the Court of Appeal, differing from him, are of the opinion that the person setting up the plea of frustration must affirmatively prove that it was not brought about through his default.

AS TO FRUSTRATION, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-217, para. 296 ; and FOR CASES, see DIGEST, Vol. 12, pp. 379-383, Nos. 3131-3158.]

Cases referred to :

(1) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596 ; 36 Digest 91, *601* ; 34 L.J.Ex. 220 ; 13 L.T. 148.

(2) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, *3093* ; 32 L.J.Q.B. 164 ; 8 L.T. 356.

(3) *Wakelin* v. *London & South Western Ry. Co.* (1886), 12 App. Cas. 41 ; 36 Digest 77, *507* ; 56 L.J.Q.B. 229 ; 55 L.T. 709 ; *affg.* (1884), 65 L.J.Q.B. 224.

(4) *La Compañia Martiartu* v. *Royal Exchange Assurance Corpn.*, [1923] 1 K.B. 650; *affd.*, [1924] A.C. 850.

(5) *Mertens* v. *Home Freeholds Co.*, [1921] 2 K.B. 526; 12 Digest 400, *3236*; 90 L.J.K.B. 707; 125 L.T. 355.

(6) *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524; Digest Supp.; 104 L.J.P.C. 88; 153 L.T. 425.

(7) *Rugg* v. *Minett* (1809), 11 East 210; 39 Digest 405, *404*. A

(8) *Robinson* v. *Davison* (1871), L.R. 6 Exch. 269; 12 Digest 378, *3123*; 40 L.J.Ex. 172; 24 L.T. 755.

APPEAL by the claimants from a judgment of ATKINSON, J., dated Mar. 1, 1940, and reported [1940] 2 All E.R. 46, where the facts are fully set out. B

A. T. Miller, K.C., *G. St.Clair Pilcher, K.C.*, and *Charles Stevenson* for the appellants.

Sir Robert Aske, K.C., and *Patrick Devlin* (for *A. A. Mocatta* on war service) for the respondents.

Miller, K.C.: The appellants' case is covered by well-established C principles. There can be no question that the arbitrator was right in principle. By the charterparty, the shipowners undertook an absolute contractual obligation to load their vessel for the charterers. They pleaded that the Australian Carriage of Goods by Sea Act was incorporated in the contract. That Act is in the same terms as the English Act, D but is applicable to the carrying voyage only. As the ship in question never became an "arrived" ship, that Act is of no assistance to the shipowners. In pursuance of the terms of the charterparty, the ship proceeded to Port Pirie, where she was to load. She got as far as the roads, and, while she was there, an explosion of extreme violence took place E in the auxiliary boiler. The explosion did so much damage to the ship that the shipowners were unable to comply with their obligation. It is admitted by the charterers that the delay caused by the explosion was such as to frustrate the commercial object of the adventure. The material defence of the shipowners became frustration of the adventure, F and, in the alternative, they pleaded that the explosion was due to the negligence of their servants. The shipowners' servant, the donkeyman, was alone in the stokehole for 90 mins. This man was paid off in South Australia by the shipowners, and there is no information as to his knowledge of the cause of the explosion. The arbitrator found himself unable G to say how the explosion occurred, and held that the shipowners had not proved frustration. That decision must be correct. Frustration means more than impossibility. There must be circumstances which render it impossible for a party to perform a contract, without there being any fault on his part. When a thing is under the control and H management of a person, and something abnormal occurs, it will be assumed against that person, unless an exception applies, that there was something wrong in the management and control. If, in the present case, the plea of frustration involves the shipowners in proving that the explosion was accidental, there is that burden of proof upon them.

They have not discharged it, and, therefore, the case must be decided against them. [Counsel referred to *Taylor* v. *Caldwell* (2), *Wakelin* v. *London & South Western Ry. Co.* (3), *La Compañia Martiartu* v. *Royal Exchange Assurance Corpn.* (4), and *Scott* v. *London Dock Co.* (1).]

Aske, K.C.: The cases regarding negligence are not germane to the present case, because the question is one of fact. The only question which arises on this award is whether a person, who has entered into a contract which in its terms is unconditional, has only to prove the destruction of the subject-matter, or whether he must also prove that the destruction was not caused by any fault on his part. The continued existence of the ship is the basis of the contract in the present case, as was the continued existence of the building in *Taylor* v. *Caldwell* (2). As soon as it is established that the building, or the ship, has ceased to exist, the basis of the contract has gone. That is the basis of the doctrine of frustration. In the present case, there is no proof of fault, and negligence should not be presumed. The burden is upon the party claiming damages to allege, and prove, if he can, that it was the other party's fault. There is no authority for saying that a defendant will fail because he does not prove that the destruction was without any fault on his part. All that a defendant has ever been required to prove in frustration cases has been the occurrence of the event, and, unless the plaintiff has proved that the destruction was due to the defendant's default, the defendant has always succeeded. [Counsel referred to *Mertens* v. *Home Freeholds Co.* (5), *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (6), *Rugg* v. *Minett* (7), *Robinson* v. *Davison* (8), and *Scott* v. *London Dock Co.* (1).]

SCOTT, L.J.: This is a very simple case, and these are the facts. There was a contract by a charterparty to provide a named ship at a named loading port, there was inability of the owner to carry out his contract because a donkey-boiler exploded and caused serious damage to the ship, and there was no exception in the charterparty covering those facts. The arbitrator was unable to say whether or not the cause of the accident was the negligence of the donkeyman or other servant of the owner, but held that it was not impossible that the accident was so caused. On those facts, the owners contended that they came within the doctrine of frustration. Mr. Willink, the arbitrator, held that they did not, but stated an interim case under the Arbitration Act, 1934. ATKINSON, J., held that the contention was well-founded. The charterers appealed to this court.

We are of opinion that the appeal must be allowed, on the ground that the arbitrator took the right view. A party *prima facie* guilty of a failure to perform his contract cannot escape under the plea of frustration unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.

I say nothing upon the point raised by counsel for the appellants as to the onus of proof in a case of negligence under such facts as were proved in *Scott* v. *London Dock Co.* (1), where there was held to be a presumption of negligence. It is not necessary for the decision of this case to consider that presumption of law upon the findings of the arbitrator here, and, therefore, I do not deal with the argument of counsel for the respondents on that point, and express no opinion as to whether his argument on that point is right or wrong. It is unnecessary to discuss the numerous cases cited by the judge. The appeal will be allowed, with costs here and below, and judgment must be in accordance with the terms of the arbitrator's finding.

SIR WILFRID GREENE, M.R.: I agree. All I wish to add is that nothing can be more dangerous, when a question of burden of proof has to be considered, than to pick out the language used by judges in cases where neither they nor anybody else were thinking of the question of the burden of proof, because it was not a matter which was in issue. The language of many of the authorities examined and cited was used with reference to the full facts which were before the court there, and nobody, I think, would be more surprised than the judges themselves who used those expressions to find that their expressions were used and relied upon as affording some assistance on the question of onus of proof, which was a matter which was not being dealt with in those judgments. I agree with what SCOTT, L.J., has said, and I agree that this appeal must be allowed.

GODDARD, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *Parker, Garrett & Co.* (for the appellants); *Holman, Fenwick & Willan* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MURPHY *v.* THOMAS E. GRAY & CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 2, 3, 1940.**]

Income Tax—Trade receipts—Insurance policy—Lump sum received by employer in respect of death of employee—Whether trade receipt—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I.*

The respondent company took out a policy of insurance under which they were entitled to receive compensation in the event of any accident to employees whose remuneration excluded them from the scope of the Workmen's Compensation Acts. In the case of death or total disablement, the sum payable was a lump sum, and, in the case of temporary disablement, it was a weekly sum during the period of disablement, but not exceeding 52 weeks. An employee was killed, and in respect of his death the company received £937 10*s.* under the policy. They contended that this sum was not a trade receipt, and that, accordingly, it should not be included in the company's taxable profits, and also that the premiums paid in respect of the policy were allowable deductions from profits :—

Held : the sum of £937 10*s.* was received by the company on income account, notwithstanding that it was a lump sum payable on the death of an employee, and it must, therefore, be included in the computation of the company's taxable profits.

[**EDITORIAL NOTE.** It has been held that the amounts received under insurance policies in respect of the loss of trading stock are trade receipts, and the same conclusion is here reached in respect of the amount received under a policy providing for payment of a lump sum upon the death of an employee.

As to Sums Received under Insurance Policies, see HALSBURY, Hailsham Edn., Vol. 17, p. 128, para. 238 ; and for Cases, see DIGEST, Supp., Income Tax, No. 204b.]

Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

F. Heyworth Talbot for the respondents.

Macnaghten, J. : Thomas E. Gray & Co., Ltd., carry on business as manufacturers of foundry materials. For a number of years they have taken out an insurance policy whereby, in the event of an accident to certain of the employees whose remuneration was such as to exclude them from the scope of the Workmen's Compensation Acts, they are entitled to receive compensation. Yearly premiums have been paid in respect of the policy, have been debited to the profit and loss account, and have been included as a trading expense in the assessment for income tax made on the company. The policy provides as follows :

> This policy of insurance witnesseth that if during the currency thereof any of the said employees [employees who had completed the forms which the insurance company required to be completed] shall sustain any injury caused by a violent, accidental, external and visible means, which injury shall solely, and independently of any other cause, result in his death or disablement, the company will, subject to the terms, provisos and conditions of the policy [pay to Thomas E. Gray & Co., Ltd.] the sum or sums of money specified in the following schedule of compensation

In the case of death or total disablement, the sum payable was a lump sum. In the case of temporary disablement, the sum payable was a weekly sum during the period of disablement, but for not more than 52 weeks.

Among employees who were included in the policy was one Waterfield, the works manager of the company. He met with a fatal accident, and in Jan., 1936, the insurance company paid to Thomas E. Gray & Co., Ltd., the sum of £937 10*s.* under the policy. The question at issue on this appeal is whether, in the assessment of the company to income tax for the year ending Apr. 5, 1938, the premium paid for the policy and the sums received by the assured under the policy should be debited and credited respectively in the accounts made up for the purpose of arriving at the assessment of the profits and gains of the company for the year in question for the purposes of income tax. During the argument the question was mooted whether this was a wager policy or a gaming policy, but both counsel for the appellants and counsel for the respondent agreed that it was not such a policy, and that the company had an A insurable interest in the lives of their employees, and also in the case of their disability by accident.

It is to be observed that the accident causing the injury to the employee, although it might, of course, arise in the course of the employment, need not so arise. Any injury to the employee caused by violent, accidental, B external and visible means wholly unconnected with his employment would give rise to a claim against the insurance company. In years past, the premiums payable on this policy have been treated as a trading expense in the assessments of the company to income tax. The company contend, however, that the sum of £937 10*s*. received in the case of the C death of Waterfield ought not to be brought into the account as a trading receipt. The Crown, on the other hand, contend that both the premium on the policy and the amount received under the policy ought to be included in the assessment of the company to income tax, or, alternatively, that, if the sum received in respect of the death of Waterfield is to be D excluded from the assessment, then the premium on the policy ought to be excluded also.

The commissioners have found "that the sum of £937 10*s*. was not a trading receipt of the company," and counsel for the taxpayer submitted that that was a finding of fact. I think, however, that the finding must E mean that the £937 10*s*. is to be treated as a receipt on capital account, which should be excluded from the ascertainment of the amount of the assessment of the company for the purposes of income tax. The question whether that receipt was to be credited to the capital account or to the income account is a question of law on the facts stated in the case. F

That the company has an interest in the continuance of the ability of its employees to carry on their employment is common ground between the parties. If an employee suffers an injury within the description of the injuries in the policy which merely disables him from performing his duties for a time, the policy provides for the payment of a weekly G sum, and it seems clear that that must be regarded as a receipt on income account. If, in the case of an employee who is unable to attend to his employment by reason of injuries received in the manner described in the policy, the company continue to pay his wages, the wages so paid would be treated as a trading expense. The sum received to compensate H them for the payment of those wages, as it appears to me, could not by any process of reasoning be regarded as a payment on capital account, or as a payment in the nature of capital. Does the same result follow in the case of death or total disablement? One would have supposed that total disablement, however caused, would result in the same amount of loss to the company, but, curiously enough, the schedule of compensation does not so provide. In the case of death or loss of sight, or the loss of both hands or both feet, or one hand and one foot, or in the case of the loss of one hand or one foot with the loss of one eye, the same sum is payable. However, in the case of the total loss of all sight in one eye, A or the total loss by physical separation of one hand or one foot, the amount payable is one-half of that which would be payable in the former cases. When one comes to permanent total and absolute disablement, other than those mentioned previously, " from following usual profession or occupation, or engaging in or giving attention to profession, business or occupation B of any kind," a lump sum is payable which is even smaller. However, although it is difficult to see why that variation is made in the amount to be paid, it is an amount which, as between the parties, has been fixed in the case of disablement of the employees included in the insurance. Are those payments on capital account or on income account, C using the word " income " in the sense of receipts which must be brought into account for the purpose of arriving at the assessment for income tax ?

The conclusion to which I have come is that they should be included in the income account, and I do not see how it is possible to hold that, D in the case of that temporary disablement, the payments must be treated as received on income account while a lump sum payable should be treated in a different way. The total disablement of an employee admittedly causes loss to the company, against which they are entitled by law to insure. The parties having assessed the amount of that loss E at a particular figure, as in the case of a value policy in marine insurance, that is the amount which has to be paid, and it remains of the same character as the amounts which, in the case of partial disablement, would be paid week by week.

My conclusion on this appeal therefore, is that, when the commissioners F found that £937 10*s*. was not a trading receipt, meaning thereby that it should be credited to capital account, their decision was erroneous in point of law, and should be reversed.

Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the inspector of taxes) ; G *Morgan, Price, Marley & Rugg* (for the taxpayers).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re HUDDERSFIELD BUILDING SOCIETY (ALTON).

[Chancery Division (Bennett, J.), **June 11, 1940.**]

Emergency Legislation—Mortgages—Appointment of receiver—Bankruptcy of mortgagor—Leave of court required both under Law of Property Act, 1925, *and under Courts (Emergency Powers) Act,* 1939*—Order of application for leave—Law of Property Act,* 1925 (*c.* 20), *s.* 110*—Courts (Emergency Powers) Act,* 1939 (*c.* 67), *s.* 1.

A mortgagor having committed an act of bankruptcy, the mortgagee applied to the court for the appointment of a receiver. For this purpose, leave of the court must be granted both under the Law of Property Act, 1925, s. 110, and under the Courts (Emergency Powers) Act, 1939. The question was under which of these Acts leave ought to be obtained first, or whether an application should be made under both Acts at the same time:—

Held: leave should first be obtained under the Courts (Emergency Powers) Act, 1939, and, when that was obtained, a further application should be made under the Law of Property Act, 1925, s. 110.

[**EDITORIAL NOTE.** This is purely a question of the practice of the court, and it is held that there is a settled practice that leave must first be obtained under the Courts (Emergency Powers) Act, 1939.

As to Appointment of Receiver on Bankruptcy of Mortgagor, see HALSBURY, Hailsham Edn., Vol. 23, pp. 444-447, paras. 654-657; and for Cases, see DIGEST, Vol. 35, p. 520, Nos. 2487-2493.]

Procedure Summons asking that the applicants should be at liberty to proceed to exercise any remedies which might be available to them to appoint a receiver and to take possession of the properties comprised in a legal charge, and also to realise the security. The legal charge contained a power, upon the mortgagor committing an act of bankruptcy, to exercise all powers conferred upon mortgagees by the Law of Property Act, 1925. These include a power to appoint a receiver. The power of appointing a receiver is made subject to the leave of the court both under the Law of Property Act, 1925, s. 110, and under the Courts (Emergency Powers) Act, 1939, s. 1, and the question arose under which Act leave should first be obtained, or whether an application should be made under both Acts at the same time. The applicants first applied to exercise their power under the Law of Property Act, 1925, but the Central Office refused to issue the summons on the ground that leave had not been granted under the Courts (Emergency Powers) Act, 1939. The applicants then took the matter before a master, who upheld the view of the Central Office. This summons was then taken out before the master under the Courts (Emergency Powers) Act, 1939.

Counsel for the respondents took the preliminary objection that the applicants had no remedy open to them, as they had not obtained leave under the Law of Property Act, 1925, s. 110. The master adjourned the summons into court.

E. M. Winterbotham for the applicants.

R. W. Goff for the respondents.

Winterbotham stated the facts.

Goff: This summons should be refused. Until leave is granted under sect. 110, the applicants have no remedy available to them. The respondent was put in a false position. He had to prove under the Courts (Emergency Powers) Act, 1939, at considerable expense, when there had been no default by him, and there was no remedy available.

A

BENNETT, J.: This is a summons under the Courts (Emergency Powers) Act, 1939, by the mortgagees under a number of charges executed by the respondent to the summons. The applicants, the Huddersfield Building Society, are the mortgagees, and one of the provisions in the mortgage deed is that, if from time to time the mortgagor shall commit an act of bankruptcy or enter into a statutory arrangement with his creditors, the mortgagees may, at any time and without previous notice to the mortgagor, exercise all powers conferred upon mortgagees by the Law of Property Act, 1925. This summons asks that the applicants may be at liberty to exercise any remedies which may be available to them under the Courts (Emergency Powers) Act, 1939, and the Law of Property Act, 1925. When the matter was before the master, the ground upon which leave was sought was that the mortgagor had committed an act of bankruptcy. The Law of Property Act, 1925, s. 110 (1), provides as follows:

B C D

> Where the statutory or express power for a mortgagee either to sell or to appoint a receiver is made exercisable by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt, such power shall not be exercised only on account of the act of bankruptcy or adjudication, without leave of the court.

E When the summons came before the master, objection was taken by the respondent, on the ground that the court ought not to entertain the application because no leave had been obtained under the Law of Property Act, 1925, s. 110, and that the applicants had to obtain leave under that section before it could be considered whether the case was F within the Courts (Emergency Powers) Act, 1939, s. 1 (2), or whether the respondent was able to prove that he had brought himself within the proviso of sect. 1 (4).

The only question upon which the summons has been adjourned before me is whether the objection is well-founded. It is the settled practice G under the Courts (Emergency Powers) Act, 1939, that, where the mortgagee makes an application to the court for leave to exercise his powers under the mortgage deed, the court does not consider whether those powers have become exercisable. The practice has been for the mortgagee to produce his mortgage deed, and the mortgagor then has H to satisfy the court that he is entitled to the benefit of sect. 1 (4) of the Act before the mortgagee can proceed under the Courts (Emergency Powers) Act, 1939, and then he must get leave under sect. 110 before he can appoint a receiver.

This application—or, rather, this objection—is an objection to the practice which has been established ever since the Act came into operation. I do not think that it matters very much whether the first step is taken under the Courts (Emergency Powers) Act, 1939, and I do not propose to interfere with the settled practice of the court. I think that the right course for the respondent to follow, if he wishes to upset this practice, is to seek relief in the Court of Appeal. I propose to overrule this preliminary objection and to send this summons back to the master A in order that he may deal with the question arising under the Courts (Emergency Powers) Act, 1939. If the respondent so desires, he can appeal.

Solicitors: *Crossman, Bloch & Co.*, agents for *T. P. Downey*, Huddersfield (for the applicants); *Boxall & Boxall* (for the respondents). B

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

WULFSON v. SWITZERLAND GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **May 6, 7, 1940.**]

A *Insurance—Property insurance—Goods insured while "in store"—Goods packed in lift vans and placed in enclosed yard at depository—Whether goods "in store."*

The plaintiff insured his household furniture and effects against all risks whilst in transit from Germany to England and, after arrival there, whilst "in store" at the P. Depositor. The goods were packed into two lift vans, and on arrival at the depository these were, owing to lack of covered space, placed in an enclosed yard with their backs against one B of the walls, hoisted some 18 ins. from the ground, and covered, except for several feet at the sides, with tarpaulins. It was found, on opening one of the vans, that a large quantity of water had penetrated into it and caused considerable damage to the furniture, in respect of which the plaintiff sued the underwriters. They thereupon contended that the goods were not "in store" in that they were not in a warehouse or C covered building or in something which could properly be called a "store":—

HELD: (i) the goods were "in store" within the meaning of the policy while they were in the possession of the depository on their premises for the purpose of storage, and were being stored by them.

(ii) even if the words did refer to proper storage in a proper place, in vans of this description the goods were in store, and it was usual D for this and other depositories to store vans in this way.

[**EDITORIAL NOTE.** This is a short point on the construction of the words "in store" in relation to a policy of insurance of goods. While it cannot be said that wherever goods happen to be can be called a store, it is found that, on the proper construction of the policy in this case, the words mean whilst the goods E are with the depository for the purpose of being stored, and that, notwithstanding that they were not in a covered building, but only in an enclosed yard on the premises of the depository company, they were nevertheless in store within the meaning of those words in the policy.

AS TO CONSTRUCTION OF POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 426-431, paras. 613-616; and FOR CASES, see DIGEST, Supp., Insurance, F Nos. 3217j-3217t.]

Case referred to:

(1) *Fisher, Reeves & Co.* v. *Armour & Co.*, [1920] 3 K.B. 614; 39 Digest 437, *662*; 90 L.J.K.B. 172; 124 L.T. 122.

ACTION claiming from underwriters the sum of £200 under an insur- G ance policy on goods in transit from Leipzig to London and whilst in store at Pall Mall Depositories, London, W.1. The facts are fully set out in the judgment.

Montague Berryman for the plaintiff.

A. J. Hodgson for the defendants.

H

ATKINSON, J.: In this case, the plaintiff is entitled to succeed. During 1938, he was living in Germany, and he wished to remove his furniture to this country. He instructed forwarding agents or packers in Leipzig named Lieberoth to handle his furniture, and they wrote to Messrs. Rosenberg Loewe & Co., Ltd., of London, asking them to attend to the business there. That was by a letter, dated Oct. 25, 1938. The furniture was, in substance, packed in two lift vans. The advantage of packing the furniture in lift vans is that they are not disturbed until they arrive at the ultimate destination. The vans safely reached Hamburg and arrived by ship in London towards the end of Nov., 1938. Messrs. Rosenberg Loewe & Co., Ltd., had been instructed, either by A Lieberoth or by Wulfson's brother, to insure these goods, and on Nov. 1, 1938, a slip was obtained providing for the insurance of:

> . . . household furniture and effects packed in lift van, £1,200, Leipzig *via* Hamburg to London; all risks of whatsoever nature whilst in transit door to door.

When the goods arrived in London, Wulfson had no house at which B they could be delivered and they were left in open barges at the docks for 11 days. Questions of demurrage arose and it was arranged that they should be stored for 3 months and Messrs. Rosenberg Loewe & Co., Ltd., were told to get the insurance extended. These words were then added to the cover note: C

> In consideration of an additional premium of 5*s*. it is agreed to extend the within insurance to cover interest as policy for the period of 3 months whilst goods in store at Pall Mall Depositories, London.

The policy, which was not in fact prepared until later, was dated Jan. 26, 1939, and insured: D

> . . . household furniture and effects valued £1,200 packed in lift van against all risks of whatsoever nature whilst in transit from door to door.

Thus it copied the words from the slip, and ended up as follows:

> Leipzig *via* Hamburg to London and for a period of 3 months (or held covered at a premium to be arranged) after arrival whilst in store at Pall Mall Depositories, E London, W.1.

After the goods had been 11 days in the open barges, Rosenberg's own men collected the goods in the two lift vans from the docks and delivered them to the Pall Mall Depository. There can be no doubt that the transit insurance expired at that moment. The goods were at the F depository until the end of Jan., 1939, when Wulfson, having then prepared his home, wanted the furniture delivered there. The vans had been sealed at the commencement of the transit, and it was only at the time of delivery to Wulfson's home that the seals were broken for examination by the customs officer. The goods in the first van G opened were in perfectly good condition, and very well packed. When the second van came to be opened, it was found that there was a very large quantity of water on the floor and walls of the van and on the furniture, and it is not in dispute that damage amounting to about £200 had been caused to the furniture. H

Wulfson seeks to recover this loss of £200 from the underwriters. He might have been able to show that the damage happened while the goods were in transit, but there is no evidence that the damage was caused while the goods were in transit, and the great probability is that the damage was caused while the goods were at the depository. I find that as a fact, and I do not think that counsel for the plaintiff challenges that that is the most probable thing, and that I ought to arrive at that conclusion. Then *prima facie* one would say: "Where is the difficulty with regard to the damage to this furniture?" The underwriters' assessor ascertained that, when the goods were delivered for the purpose A of storage to the Pall Mall Depository, the vans were placed in an enclosed yard. It was a yard some 150 ft. long and some 80 ft. or 90 ft. wide, with a concreted surface to the ground, and these two vans were placed with their backs against one of the boundary walls. They had been lifted from the ground on to boxes some 1 ft. 6 ins. to 2 ft. in height, B and a tarpaulin had been put over them and brought down some 2 ft. or 2 ft. 6 ins. from the top, where it was tightened up with cord, but, of course, leaving several feet of the sides of the vans unprotected. The fact is that, although the depository has covered places in which lift vans of this kind can be placed, and in which they are placed, for some C time then there had been so many of these vans coming over from the Continent that it was quite impossible to store them all under cover, and it had become the usual practice of this firm, if there was not room available under cover, to stack these lift vans around the yard. When these vans were placed in the way I have described, the foreman tells D me that they were merely two of a great number of vans stored in the same way. He said that that was their usual practice. When asked if it was usual elsewhere, his answer was: "Well, you can see the same thing in many other depositories in London." One other witness who dealt with that point said that it was not unusual, and that, if he E were handling lift vans for a customer, knowing that there was always that possibility, he would ascertain from the depository whether or not the vans were going to be under cover, and, if he found that they were not, would inform the customer, so that objection could be taken.

That being the position, there are two points taken on behalf of the F defendants. First, counsel for the defendants said that these goods were not in store, and that the phrase "in store" in this policy means in a warehouse or in a covered building, or in something which can be properly called a "store." I cannot bring myself to take that view. I think myself that the words mean: "whilst they are with the Pall G Mall Depository for the purpose of being stored." This policy covers the transit and then it is to cover the period between the end of the transit and the time when the goods are handed over to Wulfson at his house. It is perfectly plain that the owner of the furniture, Wulfson, wanted to be covered for the whole of that period, which is divided up H into the transit, which ends when the goods are handed over to the intended storers, and then, when they get into their possession for storage purposes, and there is an agreement for storage, and a storage rent is charged, it seems to me that, for the purpose of this policy, these goods are "in store." I think that those words really mean: "while they are stored at the Pall Mall Depository." That is the first point.

Counsel for the plaintiff has pointed out that there is no warranty here as to the nature of the storage, and that there is no warranty as to being under cover, or in a warehouse, or anything of that kind. It is simply "whilst in store at the Pall Mall Depositories." That is what I think the words mean, and I do not think that I can get any help from *Fisher, Reeves & Co.* v. *Armour & Co.* (1). There the plaintiffs, who were A
merchants in London, wanted to buy 500 cases of boiled beef. They bought it *ex*-store Rotterdam, and what in fact happened was this. The beef had arrived at Rotterdam some months previously consigned to the sellers' agents. It had been landed on to a quay, but, owing to the congested state of the port, there was no room for it in any ware- B
house, and it was stored in lighters on the water. When the purchasers discovered that, they rejected the goods tendered to them, because they said: "We bought *ex*-store, and the goods are said to have been in lighters, which is a totally different thing." As SCRUTTON, L.J., pointed out, while the goods were in lighters, the risk was a marine C
risk, and, when they were in store, the risk was a land risk, and in the sentence which is relied upon by counsel for the defendants, he said, at p. 623:

> I think the same strain is put upon the language when the word "store" is made to include any place where goods may happen to be in time of congestion. D

One cannot help but agree with that. The question here is whether they were in store within the meaning of this policy. They were on the premises of the Pall Mall Depository in an enclosed yard, which is locked at night, and, I imagine, safe from theft and fire. They were raised from the ground. They were being taken care of. The depository E
is intending to store them, and is being paid to store them, and I think that the goods are in store. If they are stored in vans negligently or improperly, and damage results, the owner may well have a claim for damages against the depository, and any underwriter who pays for that damage steps into the shoes of his client, the insured, and gets F
the benefit of any claim he may have for negligence, but, merely because, if it be the fact, the goods are stored negligently or improperly, it does not seem to me that it follows that they are not in store within the meaning of this policy.

A second point arises, and that is this. If the goods were not in G
effect in store even in the sense in which counsel for the defendants thinks I ought to take those words, were they being improperly stored? Supposing that these words do mean "whilst in store in a proper way or in a proper place," or something of that sort, on the evidence, I think that the goods were not being improperly stored. It is conceded that H
a yard may be a store, and that a store is not something which necessarily has a roof. It is conceded, for example, that it would be a proper place in which to store paving-stones. These were lift vans which it had been thought quite fit to bring without any protection from Leipzig on a ship to London, and to keep in lighters for some days in the

docks, without any further protection whatever. They are the protection for the furniture. They are made in this way so that the furniture can be carted about in safety. I accept the evidence that this has become a recognised and usual method of storing vans of this description. Therefore, I am in favour of the plaintiff on both points. First, I think that the goods were " in store " within the meaning of this policy while they were in the possession of the Pall Mall Depository on their premises for the purpose of storage, and that they were being stored by them. Secondly, if I am wrong about that, and if the words do refer to proper storage in a proper store, or in a place where it is proper to store them, then I have come to the conclusion, as I have said, that in vans of this description the goods were " in store," even giving those words the narrow meaning which counsel for the defendants wants me to give them, and that it is very usual with the Pall Mall Depository, and also with very many other depositories, to store vans in this way. It seems to me that the goods were well within the meaning of the policy at the time when the damage happened.

Judgment for the plaintiff with costs on the claim and counterclaim.

Solicitors : *Devonshire & Co.* (for the plaintiff) ; *Clyde & Co.* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MOSCROP *v.* LONDON PASSENGER TRANSPORT BOARD.

[CHANCERY DIVISION (Morton, J.), **May 8, 9, 27, 1940.**]

Trade Unions—Imposing conditions on employees—Employees of public authority accorded right of representation by union officials—Right of employees to be represented by official of other union—Condition of employment with regard to membership of union—Trade Disputes and Trade Unions Act, 1927 (*c.* 22), *s.* 6.

The defendants had accorded their employees the right to be accompanied by a representative of trade union A at the hearing of appeals in respect of disciplinary action against such employees. The plaintiff, an employee of the defendants, was a member of trade union B, and he claimed a declaration that " the condition of his employment whereby he was denied . . . the advantage of representation by an official of his own trade union [trade union B] was unlawful." On his behalf, it was contended that the denial by the defendants of the right of their employees to be represented by officials of a union other than union A was a " condition " within the Trade Disputes and Trade Unions Act, 1927, s. 6 (1), and, as such, was void by virtue of sect. 6 (3) of that Act. On behalf of the defendants, it was contended, not only that they had not imposed any condition upon the plaintiff, but also that, on the contrary, the plaintiff was attempting to impose a condition upon them, the defendants, whereby he sought to compel them to admit representatives of trade union B to the hearing of disciplinary appeals :—

HELD : the defendants had not imposed upon the plaintiff the condition of which he complained and the action must, therefore, be dismissed.

[EDITORIAL NOTE. The Trade Disputes and Trade Unions Act, 1927, s. 6, makes it unlawful for a public authority to impose any condition upon employees whereby employees who are not members of a trade union are liable to be placed under any disadvantage as compared with other employees. The court here considers the meaning of the words "impose any condition," and finds that upon a fair construction of those words, the employers did not, by giving a right of representation by a particular advocate, impose a condition that the employee could not be represented by anyone else. On the contrary, the employee had lost his right to representation by leaving his former union, and was himself seeking to impose a condition upon the employers that they should allow representation by his new union.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 32, p. 490, para. 782; and for Cases, see DIGEST, Supp., **Trade and Trade Unions**, No. 1047.]

Case referred to:

(1) *A.-G.* v. *Birkenhead Corpn.* (1928), 93 J.P. 33; Digest Supp.

Action for a declaration that the denial of the plaintiff's right to be represented by an official of his own trade union was unlawful. The facts and arguments are fully set out in the judgment.

W. P. Spens, K.C., and *Moelwyn Hughes* for the plaintiff.

H. U. Willink, K.C., and *H. E. Salt* for the defendants.

Morton, J.: In this case, for the sake of brevity I shall refer to all men who are members of any trade union as union men, and to all men who are not members of any trade union as non-union men. I shall refer to the Transport and General Workers' Union as the Transport Union and to the National Passenger Workers' Union as the National Union. The plaintiff in this case, Archibald John Philip Moscrop, is an omnibus driver in the employment of the defendants, the London Passenger Transport Board. I shall hereafter refer to all the defendant board's drivers and conductors in the Central London area as the platform staff, that being a phrase which was used in the evidence given before me. By his statement of claim, the plaintiff claims:

> (1) A declaration that the condition of the plaintiff's employment with the defendants whereby the plaintiff is denied as an appellant before the defendants' disciplinary board the advantage of representation by an official of his own trade union while such advantage is granted to or is the right of other servants of the defendants who are members of another . . . trade union is unlawful; (2) an injunction to restrain the defendants their servants or agents from enforcing such condition as aforesaid; and (3) such further or other relief as to the court may seem just.

Counsel for the plaintiff asks me only to make the appropriate declaration to the above effect, and to give liberty to apply for an injunction.

The plaintiff's case rests upon the Trade Disputes and Trade Unions Act, 1927, s. 6, which provides as follows:

> (1) It shall not be lawful for any local or other public authority to make it a condition of the employment or continuance in employment of any person that he shall or shall not be a member of a trade union, or to impose any condition upon persons employed by the authority whereby employees who are or who are not members of a trade union are liable to be placed in any respect either directly or indirectly under any disability or disadvantage as compared with other employees. (2) It shall not be lawful for any local or other public authority to make it a condition of any contract made or proposed to be made with the authority,

> or of the consideration or acceptance of any tender in connection with such a contract, that any person to be employed by any party to the contract shall or shall not be a member of a trade union. (3) Any condition imposed in contravention of this section shall be void.

The plaintiff says that the defendant board has unlawfully imposed upon him a condition which is within the terms of the latter part of subsect. (1), and that such condition is void by reason of subsect. (3). It is not disputed that the defendant board is a public authority within the meaning of this section, nor could it be disputed, in view of the London Passenger Transport Board Act, 1933, s. 1 (1), but it is said on behalf of the defendant board that it has in no way contravened the provisions of the section.

The material facts are these. The plaintiff entered the employment of the London General Omnibus Co., Ltd., on Apr. 12, 1928. The defendant board became his employers in succession to the London General Omnibus Co., Ltd., in 1933. I am satisfied upon the evidence that one of the terms of employment in force between the plaintiff, on the one hand, and his employers, on the other hand, from Apr. 12, 1928, up to Apr., 1937, was as follows:

> Appeals in respect of any disciplinary action shall be heard weekly before a properly constituted disciplinary board. Drivers and conductors attending such appeals shall be allowed to appear in plain clothes and to be accompanied by a representative of the union.

This term of employment is contained in each of the three documents which are in evidence. It was not disputed at the hearing that the plaintiff and his employers agreed to this term, and "the union" in each of these three documents is defined as the Transport Union.

The plaintiff joined the Transport Union shortly after he entered the service of the London General Omnibus Co., Ltd., and he was still a member thereof when the strike of 1937 took place. During 1928 to 1937 inclusive, the Transport Union was the only trade union which was concerned with the particular class of employees to which the plaintiff belonged.

In the spring of 1937 a strike took place, and the plaintiff and many other employees of the defendant board ceased work. I am not concerned with the details of the strike, but the ultimate result was that all the platform staff (including the plaintiff) returned to work on the terms of an agreement, dated June 15, 1937, between the defendant board and the Transport Union. One of these terms is headed "Appeals," and is as follows:

> Appeals against depot superintendent's decisions shall be heard by the divisional superintendent concerned. Divisional superintendents may also hear charges in the first instance, according to the gravity of the charge. Appeals against the decisions of the divisional superintendents shall be heard weekly before a properly constituted disciplinary board. There may be a final appeal to the general manager or his representative. Drivers and conductors attending such appeals shall be allowed to appear in plain clothes. Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union. If the appeal succeeds, the appellant shall be entitled to pay for the time lost.

It is quite plain that the union there referred to is the Transport Union.

The general position at this stage, as established by the evidence, was as follows. The defendant board had granted to all members of its platform staff the privilege of being accompanied by an official of the Transport Union when they appeared before a divisional superintendent or on appeal from him. This privilege (with an immaterial variation) had been enjoyed by all members of the platform staff since about 1916. Certainly it had been in force throughout the plaintiff's term of service with the defendant board and its predecessors. So far as the board was concerned, the privilege could be exercised by any member of the platform staff. Further, the privilege of being "accompanied" by an official of the Transport Union was treated in practice as involving that the official was free to speak on behalf of the driver or conductor as an advocate. I have used the word "privilege," because I think it is clear that this term of the contract of service was inserted for the benefit of the platform staff, for the purpose of giving them a right which they would not otherwise have possessed. In practice, however, it was not every member of the platform staff who could procure the assistance of an official of the Transport Union. This union would not allow an official to appear on behalf of any man who was not a member of this union, nor on behalf of a man who was a member of this union if his contributions were more than 6 weeks in arrear. During 1928 to 1937, there were periods when the plaintiff himself was in this position, but I do not think that this fact is material for the purposes of the present case.

What, then, was the position of the plaintiff as an individual as regards appeals on, for instance, July 1, 1937? As one of the terms of his employment with the defendant board, he had the privilege of being represented by an official of the Transport Union on appeal to the divisional superintendent and the disciplinary board. This was a term of the employment of every member of the platform staff. As between the Transport Union and the men, however, it was not every man who could in practice be represented by an official of that union, for the reasons which I have already stated. On July 1, 1937, the plaintiff could be so represented, because he was a member of that union, and his contributions were not 6 weeks in arrear.

Some time after the date of the agreement of June 15, 1937, the plaintiff ceased to pay his contributions to the Transport Union. The precise date is not material, as it is common ground that the plaintiff, by reason of his non-payment of his contributions, ceased to be a member of the Transport Union in or before Dec., 1937. It appears from his evidence that the plaintiff took this course because he was dissatisfied with the terms which the Transport Union had agreed with the board, but his reason is immaterial for the purposes of this case.

In Feb., 1938, the National Union was formed, and the plaintiff was one of its earliest members.

On Feb. 6, 1939, the plaintiff was reported by an inspector of the defendant board for failing to pick up a woman passenger at the point at which she desired to be picked up. The plaintiff's view is that he was entirely justified in going beyond this point before stopping, as a stoppage at the point where the woman was standing would have been dangerous. I have not to decide whether or not the plaintiff's view is correct, nor have I any materials on which I could base any such decision. Shortly afterwards, the plaintiff appeared before the depot superintendent, who "cautioned" him. This, as I understand the matter, amounts to a decision that the plaintiff was not justified in failing to stop. The plaintiff was dissatisfied with this decision, and gave written notice of appeal to the divisional superintendent. The notice of appeal is in evidence. It contains certain inaccuracies which are quite immaterial for the purposes of the present case. The form of notice of appeal which was filled in by the plaintiff contains the following words in print:

> I $\frac{\text{am}}{\text{am not}}$ desirous that a representative of the Transport and General Workers' Union shall accompany.

The plaintiff struck out the word "am" and left in the words "am not." He explained in evidence that he had two reasons for so doing —namely, (i) that he was not a member of that union, and (ii) that he thought that he was capable of dealing with the matter himself before the divisional superintendent. The divisional superintendent heard the case, inspected the spot where the occurrence took place, and on Feb. 15, 1939, affirmed the decision of the depot superintendent. The plaintiff then decided to appeal to a disciplinary board, and it is quite clear that he wished to be represented before that board by an official of the National Union, whereof he was then a member.

I need not state in detail what happened from that time until the issue of the writ, as there is really no dispute as to the course of events, and the material facts are summarised in the following paragraphs of the statement of claim, which are admitted:

> 3. The plaintiff appealed against the said finding of the divisional superintendent to a disciplinary board of the defendants. On Apr. 18, 1939, the defendants constituted a disciplinary board at the defendants' premises No. 55, Broadway, Westminster, S.W.1, in the county of London for the purpose, *inter alia*, of hearing the plaintiff's said appeal.
>
> 4. For the purpose of prosecuting the said appeal the plaintiff duly appeared and was accompanied by the general secretary of his said union [the National Union] to present the plaintiff's case before the said board. The defendants by their servants, a clerk in attendance upon the said board and the chairman of the said board, refused to allow the plaintiff to be represented at the hearing of his said appeal by the said general secretary or by any other official of his said union.

Two other facts are established by the evidence. First, no official of the Transport Union would have accompanied the plaintiff or represented him at the appeal, because he was not a member of that union. The position would have been the same if he had been a member of that union who was more than 6 weeks in arrear with his contributions. Secondly, if the plaintiff had appeared accompanied by an official of the

Transport Union, the disciplinary board would have allowed such official to represent him, and would not have inquired whether the plaintiff was a member of that union, or whether he was in arrear with his contributions.

In view of the refusal mentioned in para. 4 of the statement of claim, the plaintiff issued the writ in this action on May 18, 1939. The point is obviously regarded by the National Union as being of importance, and this action is launched with the support of that union, as the plaintiff stated in his evidence. The plaintiff's case rests solely on the provisions of the Trade Disputes and Trade Unions Act, 1927, s. 6. There can be no doubt that, apart from that Act, the defendant board would be entitled to say: "We are willing to hear an official of the Transport Union on appeals, or to hear the employee himself, but we shall hear no one else."

In order to succeed, the plaintiff must establish, first, that the defendant board has imposed upon him a condition whereby, to quote para. 1 of the statement of claim:

> He is denied as an appellant before the defendants' disciplinary board the advantage of representation by an official of his own trade union. . . .

I omit, for the moment, the remainder of para. 1, since it is essential for the plaintiff to establish in the first place that this condition has been imposed upon him by the board within the meaning of sect. 6. Secondly, the plaintiff must establish that, by imposing such a condition, the defendant board has contravened the provisions of sect. 6 of the Act of 1927.

On the first point, counsel for the plaintiff says that it is clear that the condition which I have just stated was imposed by the board upon the plaintiff. He says in effect: "I care not when or how it was imposed. It is enough for my case that it was in force on Apr. 18, 1939, and was put in force against the plaintiff when he sought to be represented by an official of his union on that date." At first sight, I find this argument attractive, but I am considering a statute which makes unlawful something which would otherwise have been lawful, and I must see whether the defendant board has imposed this condition within the meaning of sect. 6. It is suggested by counsel for the defendant board that the board has not imposed this condition on the plaintiff, but that the plaintiff is seeking by this action to impose a condition on the board —namely, the condition that they must hear a representative of the National Union on appeals if a member of that union so desires.

It is undoubtedly the fact that the plaintiff was in Apr., 1939, and is now, unable to be accompanied on an appeal by an official of his own trade union. It is also the fact that he was in Apr., 1939, and is now, unable to be accompanied by a barrister or solicitor. These facts are not, however, in my view, the result of the imposing of any condition by the defendant board. Apart from any express term in an employee's contract of service, the defendant board is in no way bound to allow the presence of a third party on the investigation of an alleged breach of discipline by an employee. All that the board has done in the present case is to contract with all members of its platform staff that they may be accompanied by an official of the Transport Union at the hearing of an appeal. That was a privilege, and I do not doubt that it was a valued privilege. At the time when it was granted, and right up to Feb., 1938, according to the evidence, the Transport Union was the only trade union to which members of the platform staff belonged. Apparently they did not all belong to it, but the board was in no way concerned as to whether or not any particular man belonged to it. The board said, in effect, to all members of its platform staff: "So far as we are concerned, you can be accompanied by an official of the Transport Union." It is true that the officials of the Transport Union would not appear for a non-member, or for a member who was not "in benefit"—namely, a member whose contributions were more than 6 weeks in arrear. That, however, was a matter between the Transport Union and the men. It rested entirely within the volition of each individual man whether or not he belonged to the Transport Union or kept up his contributions.

It may be said that, by specifying that men could be accompanied by officials of the Transport Union, the board impliedly stated that men could not be accompanied by anyone else. Assuming that to be true, in my judgment it is a misuse of language to describe this as "imposing a condition." If I say to my neighbour, "Your children may play in my garden on Mondays and Wednesdays," is it a fair use of language to say: "You are imposing a condition that the children may not play there on the other five days of the week"? I think not, and I do not think that it is a fair construction of the section to say that, by giving to all their platform staff the right (which they would not otherwise possess) of being represented by a particular class of advocate, the board impose a condition that they shall not be represented by anyone else. The reason why they cannot be represented by anyone else is that, apart from any special contract, the board is not bound to admit any third party to its investigations of alleged breaches of discipline by an employee.

Let me further test the plaintiff's case by inquiring when the condition of which he complains was imposed. The condition in question is a condition whereby he is:

> . . . denied as an appellant before the defendants' disciplinary board the advantage of representation by an official of his own trade union.

His own trade union is the National Union. Was that condition imposed at the time when the plaintiff entered the employment of the defendants' predecessors in 1928, or was it imposed when the plaintiff accepted, as I am satisfied that he did accept, the terms of the agreement of June 15, 1937? I do not think that it was imposed on either of these occasions. Apart from the facts that the National Union was not in existence on either of these dates and that the Transport Union was the only union to which members of the platform staff belonged, I do not think that the grant of the privilege of being accompanied by an official of the Transport Union can fairly be described as the imposing of a condition, for the reasons which I have already stated.

Was the condition of which the plaintiff complains imposed between June 15, 1937, and the issue of the writ ? In my judgment, it was not. Between these dates, the plaintiff ceased, by reason of his own deliberate act or omission, to be a member of the Transport Union. Thereby he deprived himself of all possibility of being accompanied by an official of the Transport Union. Between those dates, the defendant board did not change its attitude at all. It in no way altered the terms of the plaintiff's employment. So far as the board was concerned, the plaintiff was still free to be accompanied by an official of the Transport Union. It was the plaintiff who brought about a state of affairs in which the Transport Union would not allow any of its officials to accompany him. I cannot see how the board can be said to have imposed any condition during that period.

I think that the true view of this action is that the plaintiff is seeking to impose on the defendant board a condition that members of the National Union shall be allowed the assistance of an official of their own union on the hearing of appeals, so long as members of the Transport Union enjoy that privilege. The question whether or not this would be a good arrangement does not arise for decision by me, and I may add that, according to the evidence, no negotiations on the subject have ever taken place between the National Union and the board. I have only to decide whether or not the defendant board has contravened the provisions of a particular statute. In my view, the plaintiff has failed to establish that the defendant board has imposed the condition of which he complains in his statement of claim, and on this ground I dismiss the action. It is therefore unnecessary for me to express any concluded view on the second question which I have mentioned—namely, whether if the board has imposed this condition, it is a condition which is rendered unlawful by sect. 6 of the Act.

It has been argued by counsel for the defendant board that this section deals only with cases of discrimination between union men and non-union men, and does not cover the case of discrimination between members of trade union A and members of trade union B. I think that there is some force in this argument, though it involves a somewhat narrow construction of the section. I was referred by counsel for the plaintiff to *A.-G.* v. *Birkenhead Corpn.* (1). There are passages in the judgment of Maugham, J., which may indicate a view contrary to the argument presented to me by counsel for the defendants on this point, but the actual decision does not deal with this matter, as counsel for the plaintiff conceded. I do not think that I should serve any useful purpose by expressing a view on this point which must necessarily be *obiter*, having regard to the view which I have taken on the first question arising in this action.

Action dismissed with costs.

Solicitors : *Cole & Matthews* (for the plaintiff) ; *R. B. McDonald* (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Goddard, L.JJ.), **June 18, 19, 1940.**]

Estoppel—Previous proceedings in respect of same cause of action—Proceedings under Employers' Liability Act, 1880*—Proceedings in High Court against employers for servant's negligence.*

The appellant, a workman in the employ of the respondents, claimed damages for personal injuries caused by the negligence of another employee. He commenced an action in the High Court, but, fearing that that action would be defeated by the defence of common employment, subsequently started proceedings in the county court under the Employers' Liability Act, 1880. The amount there claimed was £468, being the total amount which the appellant could recover under that Act. The respondents paid that amount into court with a denial of liability, and it was taken out by the appellant. The respondents contended that the appellant was debarred from claiming any further sum in the High Court :—

HELD : there was only one cause of action, and, although enforceable in two different ways, in two different courts, and subject to different conditions, the claim having been completely satisfied in the county court, the High Court action was no longer maintainable.

Decision of MACNAGHTEN, J. ([1940] 2 All E.R. 441 *affirmed.*

[**EDITORIAL NOTE.** The object of the Employers' Liability Act, 1880, was to give the workman some relief against the operation of the doctrine of common employment. The Act only applies to a restricted class of claims, and the amount recoverable is also subject to severe restriction. It is decided, however, that the cause of action is the same in both proceedings, and recovery in one bars the prosecution of the other.

AS TO *Res Judicata*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469 ; and FOR CASES, see DIGEST, Vol. 21, pp. 198-216, Nos. 434-529.]

Cases referred to :

(1) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685 ; 34 Digest 232, *1976* ; 56 L.J.Q.B. 340 ; 57 L.T. 537.

(2) *Munday* v. *Thames Ironworks Co.* (1882), 10 Q.B.D. 59 ; 34 Digest 235, *2010* ; 52 L.J.Q.B. 119 ; 47 L.T. 351.

(3) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141 ; 21 Digest 207, *480* ; 53 L.J.Q.B. 476 ; 51 L.T. 529.

(4) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57 ; [1937] 3 All E.R. 628 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406.

(5) *Nelson* v. *Couch* (1863), 15 C.B.N.S. 99 ; 21 Digest 201, *443* ; 33 L.J.C.P. 46 ; 8 L.T. 577.

(6) *Perkins* v. *Stevenson (Hugh) & Sons, Ltd.*, [1940] 1 K.B. 56 ; [1939] 3 All E.R. 697 ; Digest Supp. ; 161 L.T. 149.

(7) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127 ; 17 Digest 88, *64* ; 55 L.J.Q.B. 529 ; 54 L.T. 882 ; *affg.* (1884), 14 Q.B.D. 125.

(8) *Smith (E. E. & Brian) (1928), Ltd.* v. *Wheatsheaf Mills, Ltd.*, [1939] 2 K.B. 302; [1939] 2 All E.R. 251; Digest Supp.; 108 L.J.K.B. 602; 160 L.T. 389.

APPEAL by the plaintiff from a judgment of MACNAGHTEN, J., dated Apr. 18, 1940, and reported [1940] 2 All E.R. 441, where the facts are fully set out. A

J. P. Eddy, K.C., and *W. B. Frampton* for the appellant.

C. L. Henderson for the respondents.

Eddy, K.C.: The point in question has not arisen since the Employers' Liability Act, 1880, was passed. In the High Court, the damages are at large, and the plaintiff in this action may well recover more than £468, B which is the maximum sum he could have recovered in the county court under the Employers' Liability Act, 1880, by reason of the restriction contained in that Act. If the High Court action is good when the writ is issued, it remains good, notwithstanding anything which has taken place in the county court. In such circumstances as exist in C the present case, a plaintiff has two forms of action, one at common law and the other under the Employers' Liability Act, 1880. No question of election arises, as is the case under the Workmen's Compensation Act, 1925, s. 29 (1). The proceedings in the county court do not give rise either to a plea of estoppel or to a plea of *res judicata*. Also, D there is no violation of the maxim *nemo debet bis vexari pro eadem causa*. The defendants are not entitled to invoke that maxim, because it is not possible to bring an action under the Employers' Liability Act, 1880, except in the county court. The court should give effect to the practice which has grown up during the last 60 years. [Counsel referred to E *Thomas* v. *Quartermaine* (1), *Munday* v. *Thames Ironworks Co.* (2), *Brunsden* v. *Humphrey* (3), *Wilsons & Clyde Coal Co., Ltd.* v. *English* (4), *Nelson* v. *Couch* (5) and *Perkins* v. *Stevenson (Hugh) & Sons, Ltd.* (6).]

Henderson: The cause of action under the Employers' Liability Act, F 1880, is the same as that at common law. A plaintiff must recover in one action, once and for all, all damage which has accrued in respect of one cause of action. The test as to whether or not one action is a bar to another depends upon whether or not the cause of action is the same, and not upon whether or not the damages sought to be recovered G are distinct. Whatever may have been the case before 1938, *Wilsons & Clyde Coal Co., Ltd.* v. *English* (4) has removed all doubts. The cause of action must not be confused with the form of action. Because the issues are different, it does not follow that the causes of action are different. The effect of the Employers' Liability Act, 1880, is merely H to take away from the employer certain defences which would otherwise be open to him. The plaintiff has already recovered damages in respect of the breach of duty which gave rise to the cause of action. He cannot now come before the court and ask for more: *Darley Main Colliery Co.* v. *Mitchell* (7). [Counsel referred to *Smith (E. E. & Brian) (1928), Ltd.* v.

Wheatsheaf Mills, Ltd. (8) and *Munday* v. *Thames Ironworks Co.* (2). He was stopped by the court.]

Eddy, K.C., in reply.

SIR WILFRID GREENE, M.R.: On Oct. 3, 1938, the present appellant
A issued a writ in the King's Bench Division, claiming damages against the defendants, the present respondents, who were his employers, for personal injuries caused by the negligence of the defendants' servant or servants at their works. The statement of claim was delivered on Nov. 23, 1938, and the defence was originally delivered on Dec. 14, 1938. On Feb. 14,
B 1939, the defence was amended, and, by the amendment, for the first time the defence of common employment was raised. The plaintiff's solicitors had been informed of the defendants' intention to raise that defence, and on Feb. 10, 1939, just before the expiration of the 6-months' period referred to in the Employers' Liability Act, 1880, the appellant
C issued a plaint in the Edmonton County Court under the Employers' Liability Act, 1880, claiming damages for his injuries. The damages he claimed were £468, that being the highest amount which, under the Employers' Liability Act, 1880, he was entitled to recover. The facts alleged in the plaint in the county court were in all material respects the
D same as those alleged in the statement of claim in the High Court action.

After that plaint had been issued, the respondents re-amended their defence, and the re-amended defence was delivered on Apr. 26, 1939. The amendment then introduced, referring to the plaint, alleged that the proceedings instituted in the county court were in respect of the matters
E complained of in the High Court action, and alleged that the plaintiff had recovered from the defendants in the county court proceedings the sum of £468 which had been paid into court with a denial of liability by the defendants. That sum was taken out of court by the plaintiff on Mar. 30, 1939. The amendment then proceeded to raise the contention that,
F by reason of those facts, the plaintiff was debarred from claiming or recovering any sum from the defendants in the High Court action. Pursuant to an order, the issue so raised was heard before MACNAGHTEN, J., who held that the respondents' contention in their re-amended defence was right in law, and ordered accordingly. The result was that the
G action was dismissed.

The argument on behalf of the appellant rests upon the proposition that he had two causes of action, namely, (i) a common law action, to which the defence of common employment might or might not have proved to be a good one, and (ii) a statutory cause of action conferred
H upon him by the Employers' Liability Act, 1880. It was argued that the fact that the county court claim had been satisfied by the taking out of the money in court could afford no reason why the High Court action should not be allowed to proceed. Reliance was placed upon the fact that, whereas under the Employers' Liability Act, 1880, damages are limited, at common law they are at large. It was maintained that,

notwithstanding what had happened in this case, it was competent for the appellant to proceed with his High Court action, in order to obtain, if he could, a sum by way of damages over and above the amount which he recovered in the county court. It was conceded that, if that were right, and if he did obtain in the High Court action a judgment for any sum greater than he recovered in the county court, he would have to give credit against that sum for the amount he had received in the county court proceedings.

In my opinion, the argument of the appellant is founded on a fallacy. It is to be noted that, notwithstanding the rather jejune language of the relevant county court rule which deals with the taking of money out of court, the sum paid in by the respondents and taken out by the appellant was the precise sum which the appellant was claiming. In other words, when he received that sum, his cause of action was necessarily satisfied. He was receiving exactly that for which he had asked, and his cause of action in the county court was, therefore, unquestionably satisfied. His cause of action consisted in the series of facts which it was necessary for him to allege and prove in order to substantiate the legal right which he was claiming. In my opinion, there can be no question as to the identity of the cause of action. The action in the High Court is an action claiming damages for personal injury caused by the defendants' negligence. The action in the county court is an action for damages for personal injury caused by the defendants' negligence. There was one material distinction between the two actions. That distinction, in my judgment, has no bearing upon the question as to what the cause of action is. The distinction to which I refer is that in the common law action the respondents had, if they chose to avail themselves of it, the defence of common employment, which, if it were established, would be a bar to the plaintiff's claim, whereas in the county court action, within the limits laid down in the relevant section, that defence is denied to the employers. The position was, therefore, that the plaintiff, having a cause of action against his employers for negligence, had two courses open to him—namely, (i) to raise that cause of action in proceedings in which a particular defence would be available to the employers, or (ii) to raise that cause of action in proceedings in which that particular defence would be denied to the employers. The disadvantage to the workman of the latter course was that, if he chose to fight his employers in the place where the employers could not protect themselves by that particular defence, the workman suffered under the disadvantage of having a statutory limit placed upon the damages which he could recover. On the other hand, if he chose to maintain his cause of action in proceedings in which the defence of common employment would be available to the employers, he had the advantage of being able to recover unlimited damages, provided he could get over the difficulty raised by that particular defence. That seems to me to be the true position. The cause of action quite clearly appears to me to be the same. Here is a plaintiff having one cause of action, enforceable in two different ways, in two different courts, subject to different conditions. How can such a plaintiff, when his cause of action in the one set of proceedings has been completely satisfied, carry on the other set of proceedings, and endeavour to recover damages in respect of a cause of action which already has been satisfied? The A appellant here obtained, in the county court proceedings, the solid benefit of a sum of cash which the employers were induced to pay, no doubt, because they were deprived of the defence of common employment in those proceedings. The plaintiff has chosen to satisfy his cause of action in that way, and the advantage to him of doing so is manifest. In my B judgment, by taking the course he did, his cause of action was satisfied once and for all, and can no longer be maintained in a High Court action. In the result, I am in complete agreement with the decision of Macnaghten, J., and the appeal must be dismissed with costs.

C Scott, L.J.: I agree.

Goddard, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Scott Duckers & Co.* (for the appellant); *W. Stanley Eastburn* (for the respondents).

D [*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

TEMPERANCE PERMANENT BENEFIT BUILDING SOCIETY *v.* NEVITT.

E

[Court of Appeal (Scott, MacKinnon, Clauson, Luxmoore and Goddard, L.JJ.), **June 21, 1940.**]

Mortgage—Remedies of mortgagee—Possession—Action against wife of mortgagor—Mortgagor serving soldier—Judgment in default of appearance— F *Certificate—R.S.C., Ord.* 13, *rr.* 8, 17—*R.S.C., Ord.* 55, *rr.* 5a, 5b.

A mortgagor borrowed £570 from the appellant society, the principal (with interest) to be repaid by monthly instalments. The mortgage provided that, if the instalments were 3 months in arrear, the society might take possession of the property. The instalments being in arrear for more than that period, the society issued a writ against the wife of G the mortgagor claiming possession of the mortgaged property. The mortgagor was serving with His Majesty's Forces. No proceedings were taken against the mortgagor, but the society claimed possession of the premises from his wife as being unlawfully in possession of them. No appearance was entered. The society sought leave to enter judgment by default, but produced no certificate under R.S.C., Ord. 13, r. 8, as amended, that the action was not one to which R.S.C., Ord. 13, r. 17, H applied:—

Held: (i) as the wife of the mortgagor could not in the circumstances be said to be unlawfully in possession of the premises, the issue of the writ against her was an abuse of the process of the court and must be set aside.

(ii) in the circumstances of this case, a certificate under R.S.C., Ord. 13, r. 8, as amended, had to be produced upon an application for judgment by default.

[**EDITORIAL NOTE.** The building society have here treated the wife of the mortgagor as a trespasser upon the property in order to obtain an order for possession of the property, acknowledging that, after they had obtained that order, an application would be necessary under the Courts (Emergency Powers) Act, 1939. This procedure, however, is held to be wrong, and an action against the wife of the mortgagor is subject to the rules relating to actions against mortgagors. The history of the procedure relating to actions for possession by mortgagees against mortgagors is reviewed by the Full Court of Appeal and the position under the recent amendment of the Rules of the Supreme Court in respect of judgment by default in such actions is fully stated.

As to Action for Possession by Mortgagee, see HALSBURY, Hailsham Edn., Vol. 23, pp. 360, 361, paras. 537-539; and for Cases, see DIGEST, Vol. 35, pp. 406-408, Nos. 1474-1484.]

Case referred to:

(1) *Minet* v. *Johnson* (1890), 63 L.T. 507; 38 Digest 769, *1018*.

Appeal by the plaintiffs from a refusal of Farwell, J., on June 7, 1940, to direct the registrar to enter judgment for the plaintiffs in default of appearance by the defendant. The defendant's husband, before joining the army, had in 1937 mortgaged his house to the plaintiff building society to secure £570, repayable by monthly instalments of £3 7*s*. The mortgage provided that, if 3 monthly instalments were in arrear, the society should be entitled to possession of the property. Such monthly instalments fell into arrear and were more than 3 months in arrear when the war broke out. The plaintiffs brought this action in ejectment against the wife of the mortgagor who was in possession of the property, alleging that she was unlawfully in possession thereof. The defendant did not appear, and the plaintiffs applied for an order for possession. No certificate under R.S.C., Ord. 13, r. 8, as amended, was produced and Farwell, J., refused to allow judgment to be entered.

A. T. Denning, K.C., and *M. Gravenor Hewins* for the plaintiffs.

The defendant did not appear and was not represented.

Denning, K.C.: As there was a writ and no appearance, it would appear, under R.S.C., Ord. 13, r. 8, as it originally stood, that judgment would fall to be entered as of course, unless the matter came within Ord. 13, r. 17. R.S.C., Ord. 55, r. 5a, requires notice to be given to the defendant, but this rule relates to delivery up by a mortgagor. It was thought that delivery of possession was to be confined to the mortgagor himself and not to anybody else, even though claiming under him, and, therefore, that the matter was not within R.S.C., Ord. 55, r. 5a. Where a mortgagor is much in arrear with his payments, and a right to possession has accrued to the mortgagees, there can be no doubt that a claim for possession by the mortgagees would be perfectly proper. If a person has gone away from the premises and cannot be found, a claim for possession would be perfectly proper. The mortgagor in the present case, although in possession by his wife, has not alleged that he was entitled to possession. The mistake which has been made is in describing the wife as being unlawfully in possession. The explanation is that, as the society were entitled to possession as against the mortgagor, they considered that they were entitled to an order in ejectment as against anyone holding under him.

SCOTT, L.J.: This case was adjourned for consideration by the full court. As the president of the court as it is now constituted, I should like to express my regret that SIR WILFRID GREENE, M.R., is prevented by other official duties from being present to-day, because it is a case of very great importance.

Quite shortly, in my view, the issue of this writ was itself an abuse of the process of the court. It was an abuse of the process of the court because, on the one hand, the mortgagor, against whom the proceedings were really intended, was not made a defendant, and because, on the other hand, the defendant chosen was the mortgagor's wife. It was an abuse with regard to her because it was alleged that she was unlawfully in possession of the house. If any person can be lawfully in possession on behalf of a mortgagor, it is the mortgagor's wife. That was a monstrous allegation if, as we must infer, and not merely assume, the fact that she was the wife of the mortgagor was known to the Temperance Permanent Building Society. Those who were responsible for drafting the indorsement on the writ ought to have realised that it was a most improper allegation to put upon the writ against this defendant.

As I said to counsel for the plaintiff during the argument, before the passing of the Supreme Court of Judicature Act, **1873**, the procedure in relation to mortgagees was cumbrous, because the legal title gave them a right to obtain possession in circumstances where equity would give relief. However, the mortgagee in those days was entitled to obtain judgment under the Common Law Procedure Act, 1852, s. 177. When he got possession, however, if it was a question of arrears of mortgage money, the mortgagor could take proceedings in the Court of Chancery to get re-delivery of the possession on satisfying the claims of the mortgagee, but it was a cumbrous procedure. The object of the Judicature Act in unifying the two branches of our law—namely, common law and equity—was to simplify proceedings where the two overlapped, and to enable the rules of equity to be enforced in all common law cases where equity required that they should be enforced. However, in regard to such matters as obtaining the possession of land subject to a mortgage, the old procedure, curiously enough, continued to exist, in part under a misapprehension. It was right, in many cases which had nothing to do with mortgages, that the owner of land wrongly taken possession of by a third party having no title to it should be easily able to obtain judgment for possession. Hence, when the Rules of the Supreme Court were originally framed, R.S.C., Ord. 13, r. 8, was exactly the same in wording as the Common Law Procedure Act, 1852, s. 177, and this remained so until 1940. The rule, however, was not intended to be used for the purposes of enforcing mortgages or equitable securities.

Latterly, it was found necessary to amend the rules (see R.S.C., Ord. 55, rr. 5A, 5B, and R.S.C., Ord. 13, r. 17). In Mar., 1940, an addition was made to R.S.C., Ord. 13, r. 8, and there were added words which would prevent the misuse of r. 8 for the enforcement of mortgages, for which purpose it was not intended. At the end of r. 8 there were added the following words :

> . . . upon the production of a certificate by the solicitor for the plaintiff or, in the case of a plaintiff in person, of an affidavit that the action is not one to which r. 17 of this order applies.

When one looks at r. 17, one sees the precise purpose of that amendment. Rule 17 provides as follows :

> In any action in which the plaintiff is claiming any relief of the nature or kind specified in R.S.C., Ord. 55, r. 5A [the rule allowing originating summonses to deal with mortgages], no judgment shall be entered in default of appearance without leave of the court or a judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons under R.S.C., Ord. 55 r. 5A and may require notice of such evidence to be given to the defendant.

That was in order to ensure that a mortgagor should get justice, and should not be put to the expense of independent, supplementary proceedings in equity after he had been turned out of possession by, in effect, a common law judgment in ejectment. The addition to r. 8 which was made in Mar., 1940, requiring the production of a certificate by the solicitor that the action was not one to which R.S.C., Ord. 13, r. 17, applied, carried out and completed the protection provided by r. 17.

In the present case, when the writ was brought to the registrar with a view to obtaining the entry of a judgment on Apr. 1, the amendment of r. 8 to which I have referred had just come into effect on that very day. I will assume that the plaintiffs' solicitors on that day did not know of the amendment to the rule, though of course they ought to have known of it. However, before the proceedings for judgment were, by order of Farwell, J., brought before him for consideration, they must have known of that amendment of the rule, but no certificate in accordance with the rule was ever produced, because they knew quite well that they could not give it. They knew that the action was one of the kind dealt with by r. 17.

For these reasons, in my opinion, the proceedings here from start to finish have been an abuse of the process of the court. They come within the words of Lord Esher, M.R., in *Minet* v. *Johnson* (1). In that case, the plaintiff issued a writ against one Johnson to recover possession of a house, and signed judgment in default of appearance. The headnote states the facts as follows :

> The sheriff, in pursuance of a writ of possession, ejected one H. who was in possession, and put in the plaintiff. H. had no knowledge of the action, and did not claim to hold through J. On an application by H. that the writ of summons, and all subsequent proceedings in the action, be set aside for irregularity, and that the plaintiff restore possession of the house to the applicant:
>
> **Held**, that the right order was, that the judgment and subsequent proceedings be set aside, the plaintiff to go out of any possession obtained under the judgment ;

the order to take effect only if the applicant within 12 days elect to be added as defendant . . .

On appeal to the Court of Appeal, LORD ESHER, M.R., said, at p. 507:

> In this case the plaintiff *bona fide* and without any abuse of the process of the court brought an action against Johnson to recover possession of certain premises. There is nothing to show but that he had a *bona fide* belief that the defendant
> A Johnson was the plaintiff in possession.

In the present case, the plaintiff society had ample information to show them that it was not a case for proceeding under r. 8 against anybody at all but the mortgagor. They knew that the proper person to make
B defendant was the mortgagor, and the allegation on the writ that the mortgagor's wife was unlawfully in possession was monstrous. In my view, not only must we affirm the judgment of FARWELL, J., but we must also direct that the writ and all subsequent proceedings be set aside altogether. The defendant has not appeared. She probably thought
C that it was so ridiculous to describe her position as that of somebody unlawfully in possession that it was unnecessary to take any notice of it.

I may say this further. In my opinion, the costs of this litigation cannot constitute any proper charge to be added to the mortgage, and I hope that the plaintiff society will make no attempt to take that course.

D MACKINNON, L.J.: I agree.

CLAUSON, L.J.: I agree.

LUXMOORE, L.J.: I agree.

E GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiffs).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

F
R. *v.* WESTMINSTER ASSESSMENT COMMITTEE, *Ex parte* GROSVENOR HOUSE (PARK LANE), LTD.

[KING'S BENCH DIVISION (Charles, Humphreys and Asquith, JJ.), **May 30, 1940.**]

G *Rates and Rating—Assessment—Provisional list—Objection to proposed assessment—Judicial discretion of assessment committee—Report of competent valuer not seen by parties concerned—Rating and Valuation Act,* 1925 (*c.* 90), *s.* 38, *Sched. IV, Pt. III, para.* 3.

On objection being taken to certain provisional assessments of the applicants' property, the assessment committee requested a rating
H surveyor representing the applicants to consult with the city valuer with a view to endeavouring to agree the figures in respect of the property. The surveyor and valuer agreed the figures at £16,125 gross and £13,434 rateable, and then appeared before the committee and announced these figures. The committee then adjourned, and at a subsequent meeting decided to amend the list by putting in the values of £25,800 gross and £21,497 rateable value. It was stated in an affidavit by a member of the committee that, in addition to the above information, they had

also had before them a general report from one E., a well-known surveyor, as to the effect of the war on the value of hotels and the factors producing such effect. The applicants asked for an order for a writ of *certiorari* to quash the determination of the committee, and for a writ of *mandamus* ordering the committee to determine the objection by substituting for the values entered in the provisional valuation list the values gross value £16,125, rateable value £13,434:—

HELD: (i) an assessment committee sitting to hear objections to proposed assessments are a judicial body, and must determine the matter upon the evidence before them. They ought not to consider a report which had not been disclosed at the inquiry, the contents of which were unknown to anybody except the committee. A

(ii) the form of *mandamus* should be a direction to the committee to hear and determine according to law, and the effect ought to be that the figures agreed by the surveyor and valuer should be entered as the proper figures of gross and rateable values respectively. B

per HUMPHREYS, J.: if an assessment committee employs a competent valuer to assist them in connection with the valuation of a property, they are not entitled to use his opinion as against evidence given at the hearing without giving the parties concerned an opportunity of dealing with it. C

[**EDITORIAL NOTE.** While the judgments in this case will be read with considerable interest by those responsible for giving advice upon the assessment for rating purposes of large properties in the metropolitan area, the decision does not involve any new principle of law. The case again considers the proper regulation of the proceedings of assessment committees, and also sets out again the position with regard to the inspection of property which was recently dealt with in *Hulme* v. *Bucklow Area Assessment Committee and Wilmslow Rating Authority*, [1940] 3 All E.R. 79. D

AS TO PROCEEDINGS OF ASSESSMENT COMMITTEE, see HALSBURY, Hailsham Edn., Vol. 27, pp. 470, 471, para. 900; and FOR CASES, see DIGEST, Vol. 38, p. 579, Nos. 1145-1147.] E

MOTION for an order for a writ of *certiorari* to quash a determination by the assessment committee of the city of Westminster to substitute for the valuations appearing in a valuation list in relation to Grosvenor House the figures of £25,800 gross value and £21,497 net annual rateable value, and also for a writ of *mandamus* ordering the assessment committee to substitute for the above values the figures gross value £16,125, rateable value £13,434. F

A. S. Comyns Carr, K.C., and *F. Grant* for the appellants.

R. M. Montgomery, K.C., and *Michael E. Rowe* for the respondents. G

CHARLES, J.: In this case, we are asked to order that a writ of *certiorari* should issue to remove into this court for the purposes of being quashed a determination by the Westminster Assessment Committee, given in a letter dated Dec. 19, 1939, whereby that assessment committee determined that the valuation list be amended: H

> . . . by adding to the description of the said hereditament the words "as affected by existing emergency legislation, regulations and orders" and substituting for the values appearing in the said list the following values, namely, "gross value £25,800; net annual rateable value £21,497."

We are also asked, in circumstances which I will mention in a moment, to direct that a writ of *mandamus* should issue ordering the Westminster Assessment Committee to determine the above objection :

> . . . by substituting for the values entered in the above-named provisional valuation list in respect of the above-mentioned hereditament the following values, namely, gross value £16,125 ; net annual rateable value £13,434.

A The course that this case took was as follows. On Oct. 14, the clerk to the assessment committee sent to Michael Faraday & Partners, the firm of rating surveyors, notice that the rating authority had sent to the assessment committee a provisional valuation list in which Grosvenor House had been inserted. On Oct. 25, 1939, Mr. Faraday, on behalf of B Grosvenor House (Park Lane), Ltd., gave notice of objection to the provisional list, and on the same day appeared before the assessment committee. When the objection was heard, Mr. Faraday appeared, and argued that the assessment was too high, because the war had produced what might, and should, be regarded in law as causes which would justify C a reduction of the gross and rateable values of the hereditament. Mr. Faraday had already appeared in respect of 5 theatres. When he was considering what he should recommend as the appropriate reduction from the existing list in the case of the theatres, he had been asked to meet the city valuer. Be it noted that he was asked to meet the city valuer, not D by the rating authority, whose servant the city valuer was, but by the assessment committee. Perhaps they were taking the advice of that valuer. Thus Mr. Faraday met Captain Bourdas, and they came to certain conclusions in relation to the 5 theatres. At a later date the committee approved the figures arrived at by Mr. Faraday and Captain E Bourdas. So far, the practice had worked well between Mr. Faraday and Captain Bourdas.

The assessment committee made exactly the same request in respect of Grosvenor House (Park Lane), Ltd., and the value which ought to be set upon that hereditament for rating purposes. Mr. Faraday and F Captain Bourdas came to the conclusion that the proper value which ought to be inserted in the list was the figure of £16,125 gross and £13,434 rateable value. They had done that at the request of the assessment committee, and they duly came before the assessment committee again, when it met upon Dec. 6. They indicated to the assess- G ment committee the result of their deliberations, and told them that they had agreed upon those two figures for gross and rateable value.

It is worth observing that, when Mr. Faraday and the city valuer were to consider this matter, it was at the request of the committee, and not at that of the rating authority. They were instructed, with H the assistance of outside advice, if the city valuer liked to take it, of some other skilled person, to try to ascertain and agree all the facts having regard to what were, and what were not, to be considered as " causes," and to agree the figures. They carried out that instruction exactly and reported to the committee. Then the committee adjourned, and those who were interested in the matter awaited their conclusion.

What took place afterwards was, I venture to think, quite irregular. The committee held a meeting subsequently in which they determined to amend the list by putting in the values of £25,800 gross and £21,497 rateable value. How did they arrive at those figures? It was in entire and absolute disagreement with the figures arrived at by Mr. Faraday and Captain Bourdas, who acted on their instructions, Captain Bourdas having perhaps taken advice—I do not know—as he was authorised to do by the assessment committee. However, they are quite candid as to how they arrived at that decision. In considering its decision, the committee had before it not only the figures as to trade supplied by Mr. Faraday for each of those hotels, but also his arguments as to the principles to be applied and the city valuer's reply. The committee had also had the advantage of a general report from Mr. Charles Gerald Eve, as to the effect of the war upon the value of various classes of business premises, including hotels, and as to the factors producing such effect. They had their general knowledge and experience, and considered a large number of other cases which they had heard, and so they came to the conclusion at which they ultimately arrived.

It appears to us that, once the committee sit to hear objections, they are a judicial body. Indeed, that is not disputed. They hear evidence, and they have to determine the matter upon that evidence. It is contrary to every known principle of justice that, having heard evidence—particularly the type of evidence to which I have referred here, which was evidence which was all one way—they should then go away and consider a report from someone who had never been near the inquiry, and who had made a report the contents of which were unknown to anybody except to the committee, and say that they had been influenced in their mind by that report.

In our view, the ordinary rules ought to apply, and the ordinary rules as applied to this case are as follows. The committee have heard the objection. They have heard the evidence on both sides. Both sides agree that the figures of £16,125 gross and £13,434 rateable are the only right and proper figures at which to arrive. That being so, if the committee had eliminated this report (which we cannot help thinking, and we so hold, was improperly received and considered), they had only one conclusion at which they could arrive, and that was that the figures given by the valuer whom they themselves requested to consider the matter and by the valuer of the objectors were the right figures. That is the only evidence they had. In the absence of any other evidence, in our view, if they were to determine this matter in accordance with law, they ought to have accepted those figures. The result of what I have said is that we order that the writ of *certiorari* shall issue, in order that the determination of the assessment committee, to which I have referred, may be quashed, and also that a writ of *mandamus* shall issue to the committee to hear and determine the matters which the objectors ask should be determined according to law. I have already indicated my view of what the determination should be, but the writ must be simply to hear and determine.

HUMPHREYS, J. : I have arrived at the same conclusion. The first application here is for an order of *certiorari* to quash an entry in a provisional list made by the direction of the assessment committee. It is not disputed (and to my mind it is abundantly clear) that the assessment committee, sitting, as it was, under the Valuation (Metropolis) Act, 1869, s. 47, was a judicial body, although not a court, and, therefore, was bound to exercise a discretion, and to exercise that discretion judicially.

There are two grounds upon which we are asked to order the *certiorari* to issue. The first is that there was no evidence before the assessment committee to support the entry which was ordered—that is, the gross value of a particular hereditament at the figure of £25,800 and the net annual rateable value of that hereditamant at the figure of £21,497. If that is made out, it seems to me to be a perfectly good ground on which we are bound to order *certiorari* to issue. There is another ground, which is put in this way. When the issue between the applicants and the rating authority on an objection had been settled between the applicants and the rating authority by agreement of values, as already mentioned, the assessment committee :

> . . . in determining the said objection had no power to insert in the provisional valuation list any values other than the values so agreed.

Again, I agree that that correctly states the legal position. The tribunal being one which was bound to exercise a judicial discretion, having had evidence before it, that evidence being not truly that of parties at all, but that of one person who might properly be described as a party—that is, the ratepayer who was appealing—and of another, the city valuer, on behalf of the city rating authority which he represented, and the tribunal having heard that those two persons had agreed upon certain figures, I agree that there was no jurisdiction in that tribunal to insert any other figure in the provisional valuation list. I am not saying that, in those circumstances, the assessment committee were bound to enter those figures in the valuation list at that time. I think that it may well be—I do not decide it, because it is not necessary to decide what might be the result of something which was in fact not done—that, if the assessment committee for some reason or other—perhaps because of their own local knowledge—were not satisfied with the figures which had been agreed between the parties, they might have said so, and might have asked the parties to provide them with some further evidence which would help them in the matter, or might themselves have intimated the difficulties which they felt, in order that the parties might deal with them. In other words, they might have continued to hear the matter, and have heard any evidence which the parties—I use the word " parties," not in the technical sense, but meaning the persons before them—were disposed to offer to them. I do think, however, and I entertain no doubt at all, that they had no jurisdiction at all to do what they did—namely, not only to say that they would pay no attention to the agreed figures, but also to say that they would insert figures of their own. Therefore, upon those grounds, quite apart from any question of controversial recollection in these matters, I think that this *certiorari* is bound to go.

Counsel for the respondents has said that the tribunal was entitled to do what it has said that it did. We have been told with great frankness what it was, or partly what it was, which induced the committee to direct that these new figures should be entered. The committee had before it figures of the trade supplied by Mr. Faraday on behalf of the ratepayer and also his arguments as to the principles to be applied, and the city valuer's reply. However, in fact there was something else before them, and that was the knowledge that they themselves, at the conclusion of an argument as to what causes should in law be allowed to operate in reduction of an assessment alleged to be due more or less to the war, had expressed the view as to what causes ought to be regarded as coming within the meaning of that word as used in the Act of Parliament, and had directed the city valuer, as their agent, if he re quiredit, to take advice on the question of what causes should properly be considered by him. Thus, the position was that those two persons had reported to them on the facts and on the figures at which they had to arrive, having regard to the views, as they were understood, of the assessment committee, as to the causes which in law should be allowed to operate. The committee also had the advantage of a general report from Mr. Charles Gerald Eve, a very well-known surveyor, as to the effect of the war upon the value of various classes of business premises, including hotels, and as to the factors producing such effect. I need not add to, because I entirely agree with, the words which have fallen from Charles, J., in describing the notion that any judicial tribunal can be allowed to take into consideration evidence which is given to it, whether in the form of an oral statement or in that of a written report, by any person, when it is considering the matter privately and behind the backs of the persons to be affected.

Without adding to what Charles, J., has said, I would refer to the argument of counsel for the respondents that that was a perfectly proper thing in this case, because it is specifically allowed, as he contended, by the Rating and Valuation Act, 1925, s. 38. I desire to say that I profoundly disagree with that suggestion. Sect. 38 authorises any rating authority or any assessment committee or any county valuation committee to employ a competent valuer, whom they could not employ without the authority of that section, because they would have no money with which to pay him. That I believe to be the explanation of that section. It authorises the employment of a competent valuer to give advice and assistance in connection with the valuation of any hereditaments in their area, and any person so employed shall have power to go and examine and enter the hereditament which he has been asked to value. There are provisions giving him authority, which no ordinary person has, to go into the ratepayer's house, with or without the ratepayer's consent, and to inspect it for that purpose.

The first question is whether or not that authorises any assessment committee to take that course on the hearing of an objection, as distinct from the time when the assessment committee is valuing the hereditament, which they have to do, whether or not any objection is taken. It may be that it does. Without deciding the matter, or expressing any opinion upon it, I will assume that it does. Was it done in this case ? I protest against the suggestion that we are to suppose that Mr. Eve had been appointed under sect. 38 in regard to Grosvenor House when there is not a shred of evidence before us to justify such a suggestion. Indeed, so far as his instructions went—and that is all upon which he can rely, there being no evidence about it at all—counsel for the respondents agreed that it was extremely unlikely that Mr. Eve had ever had brought to his attention the fact that Grosvenor House, which was the hereditament in this case, had ever appealed against its assessment, or knew anything whatever about it. So far from there being any statement to the effect that Mr. Eve was a surveyor appointed to assist the assessment committee under sect. 38, all that is said is that he had made some general report. We do not even know whether he had made it to this assessment committee, to all the assessment committees of London, or to any other body. It is said that he had made a general report as to the general nature of the effect of the war, and the regulations resulting from the war, upon such buildings as theatres, hotels, or buildings of a like character. In my view, it is quite wrong to say, upon the evidence in this case, that Mr. Eve had ever been appointed under sect. 38. Supposing, however, that he had been, what would the result be ? Does that authorise this judicial tribunal to accept that report as evidence, without giving the parties an opportunity of hearing what it is ? The answer, it seems to me, is to be found, as counsel for the appellants has said, in Sched. IV, Part III, para. 3, of the Act of 1925, which deals with what is to be done in the case where an assessment committee or other tribunal does appoint such a surveyor. I am not troubled with the fact that, in making the Rating and Valuation Act, 1925—an Act which primarily does not apply to London at all—apply to London, as has been done by a later Act, there has been an omission to make the schedule of the 1925 Act apply to London. Sect. 38 apparently is a specific section which is to apply to London. That being so, I have no doubt myself that those parts of the schedule which deal with sect. 38 must also be taken to apply to London.

Schedule IV, Part III, para. 3, of the Act of 1925 provides as follows :

> On the consideration of an objection any valuer employed by the assessment committee to value the hereditament to which the objection relates may be called as a witness.

That seems to me to be quite a sufficient indication to dispose of the argument that any authorisation is given by this statute to the use of the opinion of such a person, as against evidence which is given in open court, without giving the parties an opportunity of dealing with it.

My view being, therefore, that *certiorari* ought to go in this case, what is the result ? We have been invited by counsel for the appellants to order a *mandamus* to issue. It is clear that we must, because, having ordered that *certiorari* shall issue to quash the order, something or other must be substituted for the order assessing the values. It is clear that *mandamus* in some form must go. Counsel for the appellants has invited us to make an order in this case that *mandamus* should go direct to the assessment committee to enter the figures which were agreed upon between the valuers. I do not think that we have any power to make an order in those terms. I think that the only order we can make in such a case as this is to direct the issue of a writ of *mandamus* "to hear and determine according to law." In my view, that means to hear and determine so far as necessary according to law, and in this case, in which the tribunal itself has said that it has heard all the evidence which it desires to hear, and in which the parties have been invited to produce any further evidence, if they desired it, and in which we know that both those parties have said that they do not desire to adduce any further evidence, in my opinion, the effect of the issue of a writ of *mandamus* in this case will be that the agreed figures are the proper figures of gross and rateable value respectively to be entered in the list. However, for the reasons I have given, I do not think it possible to direct it in any other form than that a *mandamus* should go "to hear and determine."

ASQUITH, J. : I agree, and I have nothing to add.

Order accordingly.

Solicitors : *Richardson, Sadler & Co.* (for the appellants) ; *Allen & Son* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD.

[KING'S BENCH DIVISION (LAWRENCE, J.), **June 10, 11, 1940.**]

Revenue—National defence contribution—"Income received from investments or other property"—Bank interest on current account—Finance Act, 1937 *(c.* 54*), Sched. IV, r.* 7.

Interest received by a trading company from a bank upon a current account is income received from investments or other property within the meaning of the Finance Act, 1937, Sched. IV, r. 7, and is excluded from the computation of the company's profits for the purposes of national defence contribution.

[**EDITORIAL NOTE.** The intention of the Finance Act, 1937, Sched. IV, r. 7, is to exclude from the profits of a business income derived from the investment of money not being used in the carrying on of that business. Money invested in securities or on deposit at the bank is obviously not being used in the day-to-day prosecution of the business, but the difficult question here arises whether money lying in the current account is being used in the trade. The view is taken that this money is being used in the trade of the bank, and not in that of the customer, and, therefore, the interest allowed upon it is not to be included in the computation of profits for the purposes of national defence contribution.

As to National Defence Contribution, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, pp. 356-368.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Gas Lighting Improvement Co., Ltd.* (1923), 12 Tax Cas. 503.

(2) *Liberty & Co., Ltd.* v. *Inland Revenue Comrs.* (1924), 12 Tax Cas. 630.

(3) *Re Price, Price* v. *Newton,* [1905] 2 Ch. 55 ; 44 Digest 565, *3824* ; 74 L.J.Ch. 437 ; 93 L.T. 44.

Case Stated by the Special Commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The Imperial Tobacco Co. (of Great Britain and Ireland), Ltd., were assessed to the national defence contribution in the sum of £160,821 for the period Apr. 1, 1937, to Oct. 31, 1937. This assessment included a sum of £20,612 in respect of bank interest received by the company during that period. The company had a number of branches, each operating its own banking account, and the interest in question was the interest allowed by the bank on the daily balances at the various branches where the company had an account. By the Finance Act, 1937, s. 19 (1), a tax called the national defence contribution is levied upon the profits of every trade or business to which that section applies. By Sched. IV of that Act, the income tax provisions as to the computation of profits are adapted for the purposes of the national defence contribution. Para. 7 provides as follows :

> Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise . . . (*b*) in the case of any other trade or business, being a trade or business carried on by a body corporate, the profits shall include all income received by way of dividend or distribution of profits from any other body corporate in which the first-mentioned body corporate has a controlling interest and which is not liable to be assessed to the national defence contribution . . .

The commissioners held that the bank interest on current account was income received from investments, and was, therefore, excluded from the computation of the company's profits for national defence contribution. The Crown appealed.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the appellants.

Cyril King, K.C., and *F. Heyworth Talbot* for the respondents.

Lawrence, J. : This is an appeal against a decision of the Special Commissioners on an appeal against an additional assessment to the national defence contribution in the sum of £160,821 for a period from

Apr. 1, 1937, to Oct. 31, 1937. In that assessment, there is a sum of £20,612, which is $\frac{7}{12}$ of the total amount of bank interest received by the respondent company in the year up to Oct. 31, 1937. The Special Commissioners decided that this bank interest was income from investments or other property within the meaning of the Finance Act, 1937, Sched. IV, r. 7, and was expressly excluded from the computation of the company's profits for national defence contribution by that rule. The question is whether the interest which the respondent company received on its current account at its bank is income received from investments or other property within the meaning of r. 7. Counsel for the Crown contend that this interest is not income received from investments or other property within the meaning of r. 7, and they rely upon, among other things, *Inland Revenue Comrs.* v. *Gas Lighting Improvement Co., Ltd.* (1), in which the House of Lords held, under the similar, but not identical, provision of the Finance Act, 1915, which dealt with excess profits duty, that investments by the company there in question in other companies which competed with the company were none the less investments for the purposes of the Finance Act, 1915, the argument on behalf of the company being that these were not investments within the meaning of the Finance Act, 1915, because the object of them was to acquire an interest and a certain measure of control in a company which competed with the company. In that case, there is a passage in the opinion of Viscount Cave, L.C., which appears to me to throw a considerable light upon the question with which I have to deal. Viscount Cave, L.C., said, at p. 535:

> My Lords, I find nothing in the Act which compels or admits of such a limitation of the meaning of the word "investments" [that is the limitation contended for]. The expression cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of that character could in no case be regarded as capital of the business, and it would be quite unnecessary to direct their exclusion. It must therefore refer to investments connected with the business, and I see no reason why it should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations for which the business was constituted.

In my opinion, the crucial words for the present purpose there used by Viscount Cave, L.C., are "in an outside security." That is the limitation which, in my opinion, has to be imposed upon these words.

It was contended also for the Crown that *Liberty & Co., Ltd.* v. *Inland Revenue Comrs.* (2), also supported the Crown's position. That was a case in which it was contended by the company that sums of money placed in war loan, which would shortly be required by the company for the purpose of building a shop to be used in its business, were not investments because they were placed in war loan only temporarily. That argument was negatived by the Court of Appeal. The case is perfectly consistent with the view which I have indicated of *Inland Revenue Comrs.* v. *Gas Lighting Improvement Co., Ltd.* (1). Indeed, it tends against the argument for the Crown, in that it recognises that, no matter how temporary the investment may be, it may still be an investment within the meaning of the rule.

The other case which was relied on by the Crown was *Re Price, Price* v. *Newton* (3). That was a case which arose upon the construction of a will, and the question was whether money on deposit with the testator's A bankers, subject to more than 24 hours' notice of withdrawal, would pass under a bequest of ready money or under a bequest of pecuniary investments. FARWELL, J., deciding that the money on deposit would not pass under either of those descriptions, said, at pp. 58, 59:

> I think that no one in ordinary parlance speaking of money which he puts on B deposit account at his bankers at a short call like this—ten days—taking the usual banker's interest, which is 1 per cent. below bank rate, would treat himself as making an investment, or as investing in a mode which could be intended by him as an investment to be continued after his death by his trustees "in its present state of investment" within the meaning of those words. It is a little difficult to dogmatise about matters of this sort, and I quite feel the force of the observation that people do use the words "invest" and "investment" nowadays in very odd collocations. On the other hand, the rules of court distinguish between money C on deposit and money invested . . .

Then he goes on to discuss certain other cases, and he ends by saying, at p. 59:

> The distinction, to my mind, is really plain. The money which is deposited with your banker awaits investment: the fact that it earns interest does not make D it an investment. It is immaterial that it produces interest by being put on deposit. I think there is great force in the observation made by Mr. Upjohn that the fact that it earns interest cannot make it an investment, because it is quite within recent times—there may be some banks which do it even now—that banks have allowed interest on current accounts if they exceed a certain amount. The result is that in my opinion this sum falls into residue.

On that case, it was contended by counsel for the appellants that the E present case was obviously an *a fortiori* case, because there it had been held that even money upon deposit account was not money invested. In my opinion, however, that case does not really throw much light upon the present case, because it was a decision upon the construction of a will, the terms of which threw light upon the words which the F judge had to construe—namely, the words "ready money or pecuniary investments"—and it is impossible, in my view, to argue from the construction of such a will as that to the construction of this statute.

In addition to those cases, it was contended that there must be some degree of permanence to come within the words "income received from G investments or other property." In my judgment, however, that is not altogether consistent with the decision of the Court of Appeal in *Liberty & Co., Ltd.* v. *Inland Revenue Comrs.* (2), and it is altogether too vague a criterion. In any event, it does not have any bearing upon the meaning of the other words which are used—namely, "income from other H property." In my opinion, the rule contrasts investment income and trade profits. I think that the words mean, as VISCOUNT CAVE, L.C., seems to me to have suggested in his opinion in the *Gas Lighting Improvement Co., Ltd.*, case (1), income derived from sources outside the trade, and produced by money or money's worth not then used in the trade. Money on current account with the bank is not, in my opinion, money which is used in the company's business. It is used in the banker's business. In my opinion, it is impossible to exclude from these words in r. 7 interest which is received upon a current account from a bank.

There were two other points which were argued. It was said that,
even if the respondents were wrong on the construction of r. 7, yet this
interest did not fall to be taxed within the provisions of the Finance A
Act, 1937, because it did not fall under Sched. D, Case I, and was not
brought into Sched. D, Case I, by the words of sect. 20 (1), which provides as follows;

> . . . or would be so computed if income tax were chargeable under that case in
> respect of the profits so arising. B

That is Case I. In my opinion, the respondents are wrong upon this
part of the case, for the reasons both that such interest as this does fall
within Case I, and, therefore, it is not necessary to have recourse to
the words in the Finance Act, 1937, s. 20 (1), and that, if it were necessary to have recourse to those words, it would be covered by those words. C

It was also contended by the respondents that the assessment upon
the basis of $\frac{7}{12}$ of the whole year was wrong, and that the actual amount
of the interest which had been earned ought to be taken into account,
and not a notional figure such as $\frac{7}{12}$. This depends upon the construction of the Finance Act, 1937, s. 20 (3), (4), and it is not necessary for D
me, perhaps, to express an opinion upon it. As far as I have considered
the matter, it seems to me that the decision of the commissioners was
final upon that subject. On the whole appeal, I am of opinion that
the decision of the Special Commissioners was right, and that the interest
in question was income from investments or other property within the E
meaning of r. 7. The appeal will, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *T. M. Sowerby* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*] F

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., AND DRYSDALE *v.* MIDLAND BANK, LTD., SCOFFIN AND WILLMOTT, LTD., AND PLANT BROTHERS, LTD. (IN LIQUIDATION). G

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Goddard, L.JJ.), **June 6, 7, 10, 11, 12, 13, 1940.**]

Insurance—Fire insurance—Policy indorsed in favour of three named parties "for their respective rights and interests"—Claim made by one and payment by cheque in favour of all three—Cheques indorsed by all and paid to credit of claimant—Action to recover amount paid on ground of arson by claimant's employee—Whether money recoverable from parties other than claimant as paid under mistake of fact. H

By a policy of insurance dated Mar. 25, 1935, the appellant company agreed to pay to the insured the value of the property or the amount of the damage, in case of destruction or damage by fire, of plant and stock of P.B., Ltd., contained in a building occupied by them as their business premises, and also of the building. S. & W., Ltd., were the owners of the freehold of the building and the bank had a floating charge over the stock in respect of an overdraft granted to P.B., Ltd. and guaranteed by S. & W., Ltd. P.B., Ltd., was a controlled subsidiary of S. & W., Ltd. The building and stock were damaged by fire, A and at the time of the loss the policy, which had originally been in favour of other parties, was indorsed: "The interest in the insurance by this policy is now vested in P.B., Ltd., S. & W., Ltd., and the bank for their respective rights and interests." A claim in respect of the loss was made by P.B., Ltd., alone and the insurers paid the amount of the loss by four cheques each drawn in favour of the three parties mentioned in the indorsement, which cheques were, however, B indorsed over by the other parties to P.B., Ltd. and duly paid to that company. It was subsequently discovered that the fire had been wilfully caused by a servant of P.B., Ltd., and on this ground the insurance company sought to recover the amount paid. P.B., Ltd., were then in liquidation and did not appear in the action, and the contentions were, therefore, confined to the right of the insurance company to recover the amount paid from S. & W., Ltd., and the bank:— C

HELD: (i) the insurance effected by the policy was not a joint insurance, but one which operated as an indemnity in respect of each individual different loss which the various named parties might suffer. The words "the insured" must be construed and qualified by the words "for their respective rights and interests," and the indemnity must be construed as one to pay each and every of them as circumstances may require. D

(ii) although on the true construction of the contract, the cheques should have been made out to P.B., Ltd., alone, the insertion of the names of the other two was a mere mistake, and their indorsement of the cheques in order to make them negotiable in the hands of P.B., Ltd., had no effect in making them recipients of the money, and therefore liable to a claim for repayment on the ground that the money was paid E under a mistake of fact.

[**EDITORIAL NOTE.** It is usual, when other parties, such as mortgagees or chargees, become interested in the property insured, to indorse the policy in terms similar to those in the indorsement here considered. The consideration of the effect of such an indorsement is the most important part of the judgment in this F case. It was argued that the effect of such an indorsement was to create a joint insurance, but it is clearly laid down that the question whether an insurance is joint must be determined by the nature of the interests insured and the construction of the policy as a whole.

AS TO INSURANCE OF DIFFERENT INTERESTS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 490-492, paras. 742-745; and FOR CASES, see DIGEST, Vol. 29, G pp. 311-313, Nos. 2566-2579.]

APPEAL by the insurers from a decision of TUCKER, J., dated Jan. 25, 1940. A policy of insurance dated Mar. 25, 1935, insured Plant Bros., Ltd., Scoffin & Willmott, Ltd., and the Midland Bank, Ltd., "for their H respective rights and interests" in the stock and plant of Plant Bros., Ltd., contained in a building wherein their business was carried on, and in the building. The building and plant were damaged by fire, and the insurers, in pursuance of a claim made by Plant, Bros., Ltd., paid in respect of the damage a certain sum by four cheques drawn in favour of the three insured, which cheques were indorsed by the insured and paid to the credit of Plant Bros., Ltd. It was subsequently discovered that the fire had been wilfully caused by a servant of Plant Bros., Ltd., and the company accordingly sued to recover the amount paid. Plant Bros., Ltd., which had gone into liquidation, did not appear in the action. TUCKER, J., held that the claim had been made by Plant Bros., Ltd., who were entitled to the insurance money, and that the indorsements by Scoffin & Willmott, Ltd., and the Midland Bank, Ltd., were a matter of machinery to enable the claim of Plant Bros., Ltd., to be satisfied, and that nothing was, therefore, recoverable from Scoffin & Willmott, Ltd., and the Midland Bank, Ltd. Thereupon this appeal was brought.

A. T. Miller, K.C., *H. D. Samuels, K.C.*, and *Cyril T. Miller* for the appellants.

John W. Morris, K.C., and *H. G. Robertson* for the first respondents.

H. U. Willink, K.C., and *G. Granville Sharp* (for *W. L. McNair* on war service) for the second respondents.

The third respondents did not appear and were not represented.

SIR WILFRID GREENE, M.R.: The appellants, who were the plaintiffs in the action, are the General Accident, Fire and Life Assurance Corporation, Ltd., and Mathew Watt Drysdale, one of a number of Lloyd's underwriters who wrote the Lloyd's policy in question in this case. The appeal is from a judgment of TUCKER, J., dismissing the action as against the first two defendants, the Midland Bank, Ltd., and Scoffin and Willmott, Ltd. The third defendants, Plant Brothers, Ltd., who are in liquidation, did not appear in the action. I shall not attempt to set out the facts which are relevant to the present inquiry. They are sufficiently stated in the judgment of the judge, and all that I need do is to refer to one or two matters which have a special reference to the reasoning upon which I consider this case ought to be decided.

At the date when the two policies became effective, the persons named as the insured in the policies were interested in different ways. Plant Brothers, Ltd., were carrying on their business upon certain premises, part of which they owned themselves and part of which they occupied as tenants at will of Scoffin and Willmott, Ltd., who were the freeholders of that part, which was damaged by the fire. Upon those premises, Plant Brothers, Ltd., had certain stock belonging to them. The Midland Bank, Ltd., who were the bankers of Plant Brothers, Ltd., were creditors upon a current account for an overdraft, which fluctuated from time to time. The limit was £20,000, which on occasions had been slightly exceeded. As security for that overdraft, the bank held a debenture, which was by way of floating charge alone. There was no fixed charge in it, and at the relevant time it remained a floating security which had not yet crystallised. The position of the Midland Bank, Ltd., therefore, was that its interest in the property, both building and stock, which was the subject-matter of the insurance, was that of a holder of a floating charge, and, as the result of that situation, when the stock was destroyed and the building damaged by fire, the property subject to the floating charge had to that extent disappeared or depreciated, and its place was taken by the claim which Plant Brothers, Ltd., had against the underwriters. That is the nature of a floating charge. It floats over and comprises all the property, whatsoever it may be, at any given A moment, of the person giving the charge. If one piece of property is replaced by another piece of property, the first piece of property drops out, and the new piece of property comes in.

Besides being interested as freeholders of part of the premises of Plant Brothers, Ltd., Scoffin and Willmott, Ltd., also had another interest B in this way. They had guaranteed the debt of Plant Brothers, Ltd., to the bank. That by itself would not have given them an insurable interest in the property of Plant Brothers, Ltd., but one result of their giving a guarantee was that, if and when they were to be called upon to implement it, they would be entitled to take over from the bank the C security which it held, and in that sense they had a contingent interest in the stock which was covered by the insurance. Those, therefore, were the interests of the various parties named in the policies. They were interests of a differing character, and they were interests in respect of which not all the parties were in anything like the same situation. For D example, Scoffin and Willmott, Ltd., had a special interest in part of the buildings in their character as freeholders. That was a character which they did not share with the Midland Bank, Ltd., who had no such interest, or with Plant Brothers, Ltd., who were only the tenants at will of those premises. Scoffin and Willmott, Ltd., also stood in another E relationship to Plant Brothers, Ltd., which gave them what might be called a business interest in the assets of Plant Brothers, Ltd., but that interest was not one, as is conceded, which would amount to an insurable interest. It was their interest, if not as the holders of all the shares, at any rate as the holders of the controlling interest in the F share capital, of Plant Brothers, Ltd.

Those being the different interests of the parties, these insurances come into force, and the first question, and, to my mind, the crucial question, in this case depends upon the true construction of the policies. I need only refer to one of them, the general accident policy, which is the G leading policy. Such variations from its form as are to be found in the Lloyd's policy do not affect the substantial question of construction, since both, in my opinion, have the same effect and the same meaning. Turning, therefore, to the general accident policy, the first matter which calls for notice is that the policy is upon a printed form, with typewritten H additions. Both the body of the policy and the printed conditions are quite clearly drafted with a view to an insurance in favour of one individual insured. It is only when the typewritten conditions are examined that it is found that there is not one named insured. There are three. Most of the difficulties in this case have arisen from the circumstance so frequently found that a printed form has been used for a purpose for which it was not intended, and the alterations in that form which that purpose required in order to avoid ambiguity have not been made. Accordingly, we have to construe the document as best we can, always remembering that in such a case the printed form may yield to the added matter—be it typewritten, handwritten, or whatever it may be—if it is necessary that it should do so, for the purpose of arriving at a reasonable and consistent construction of the document as a whole. The policy starts in these terms:

> In consideration of the insured named in the schedule hereto paying to the General Accident, Fire and Life Assurance Corporation, Ltd. (hereinafter called the corporation) the first premium mentioned in the said schedule, the corporation agrees . . .

When the schedule is examined in order to find out the name of the insured, these two matters appear. First of all, in the body of the schedule as originally drawn, there appears the following statement (I omit addresses and descriptions):

> The insured: Messrs. Plant Brothers, Ltd., Col. S. A. Medcalf, A. H. Maxwell, Esq., and James Neilson, Esq., and the Midland Bank, Ltd., of Enfield, Middlesex, for their respective rights and interests.

The policy, when first taken out, was taken out in those names, the three named persons being at that time the owners of the freehold property subsequently acquired by Scoffin and Willmott, Ltd. Next there comes an indorsement, dated Oct. 20, 1936, which became necessary by reason of the acquisition by Scoffin and Willmott, Ltd., of the freehold, as the result of which the three named persons ceased to have any interest in any of the property covered by the insurance. The indorsement of Oct. 20, 1936—again omitting addresses and so forth—is as follows:

> The interest in the insurance by this policy is now vested in Messrs. Plant Brothers, Ltd., Messrs. Scoffin and Willmott, Ltd., and the Midland Bank, Ltd., of Ilford, Essex, for their respective rights and interests.

The reference to the Ilford branch appears because in the meanwhile the main account of Plant Brothers, Ltd., had apparently been transferred there. At any rate, that was the branch which was brought into the picture in place of the Enfield branch, because Scoffin and Willmott, Ltd., had their account there. However, that is of no importance. The words "The interest in the insurance by this policy is now vested" are, of course, a loose expression. The legal position which it is intended to declare appears to me to be more accurately stated by saying that the persons whom the underwriters now undertake to indemnify by this document are those three named persons "for their respective rights and interests." When it is said that the interest in a policy is now vested in so-and-so, all that that means is that so-and-so is the person whom the underwriter contracts to indemnify.

The next matter in the policy which requires attention is the undertaking for payment by the General Accident, Fire and Life Assurance Corporation, Ltd. In the event of the property insured being destroyed or damaged by fire, the premium having been paid, the corporation undertakes to:

> . . . pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof.

A There is also specified in the schedule a limit of liability to the sums mentioned. Next come the printed conditions. I shall have to refer to one or two of those presently, and I will not read them now.

I now turn again to the schedule. It is found that the property insured falls into two categories. The first is building, in respect of which a B limit is stated, and the second is:

> . . . stock in trade, including raw materials, goods manufactured or in course of manufacture, the property of the insured or held by them in trust or on commission for which they are responsible whilst in said buildings [with certain exceptions] or in the open yards near.

Then there is a limit of £40,000 under that head. In respect of both C those two items, there is the further limit in this policy that the General Accident, Fire and Life Assurance Corporation, Ltd., undertake only 20 per cent. of the risk, the remaining 80 per cent. being undertaken by Lloyd's underwriters under the Lloyd's policy. In respect of the stock, there is the common provision for periodical declarations, with the con- D sequential necessity for adjustments in the premium. Those adjustments might involve either repayments by the company or additional payments by the insured. There is a clause providing for that, and providing that the insured undertakes to make the declarations and, on expiry of the period of insurance, to pay the balance, if any, of the premium E due on the average of the declarations. There are various undertakings by the insured, many of them of a detailed nature, as, for instance, matters with regard to fire precautions on the premises.

That being the general character of the document, it is argued on behalf of the appellants that the insurance effected by it—and also, of course, F by the Lloyd's policy, with which I am not troubling myself—is that described as a joint insurance. Counsel for the appellants, while maintaining that argument, claimed that it was not essential to the success of his case. I myself think that the success of that argument is essential to his case, for reasons which will later appear. I will now address myself G to a brief consideration of that argument, which is affected by two considerations. The first consideration is the true meaning and effect of the document itself which is claimed to have such a result, and the other consideration is whether a joint insurance—using that phrase in any accurate sense—can exist in a case such as the present, where the H interests of the parties are not joint in any sense. I will first say a few words about that latter point. That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property—and I use that phrase in the strict sense—an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combining in one insurance a number of persons having different interests in the subject-matter of the insurance. However, I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case, the interest of each of the defendants is different. The amount of his loss, if the subject-matter of the insurance is destroyed or damaged, depends upon the nature of his interest, and the covenant of indemnity which the policy gives must necessarily, in such a case, operate as a covenant to indemnify in respect of each individual different loss which the various persons named may suffer. There is no joint element at all in such a case.

Applying those considerations to the facts of the present case, there is no joint loss to the bank and to Scoffin and Willmott, Ltd., in respect of the damage by fire to the premises. The bank, in truth, having only a floating charge, suffered no loss at all, and, even if its floating charge had crystallised, its interest in the premises would have been quite different from that of Scoffin and Willmott, Ltd., who were freeholders. How, then, can there be a joint insurance, in any true sense of that phrase, of the interest of a freeholder in freehold premises and the interest of a debenture holder holding a floating charge on that mass of property, including, among other things, those premises ? There is no joint risk. There is no joint interest. The measure of loss suffered by those two parties will be different, calling for a different measure of indemnity, and, accordingly, it seems to me that there is no joint element about the thing at all. Such a policy, in my judgment, may be more accurately described as a composite policy, because, for reasons of obvious convenience, it comprises in one piece of paper the interests of a number of persons whose connection with the subject-matter of the insurance makes it natural and reasonable that the whole matter should be dealt with in one policy. I make those observations, although they are not strictly necessary, having regard to the view which I have formed of the true meaning of the policy. Even if it were possible to have a joint policy in favour of those three persons—using that phrase in the sense in which counsel for the appellants used it—in my opinion, this document is not such a policy, on its true construction. The description of the insured by name, followed by the words "for their respective rights and interests," read in its natural sense, indicates that these three persons, having interests which it is not material to investigate for the purpose of the document, are minded to combine in one policy, and each of them shall obtain cover from the underwriters in respect of his right or interest, whatever it may be, and, of course, it may vary from time to time. One obvious way in which a variation might have taken place, of course, would have been if the bank, during the currency of the policy, had proceeded to enforce its floating charge. However, without doing violence to the language, I find myself unable to give to the words "for their respective rights and interests" any meaning other than that which I have indicated. If I am wrong in the view which I have expressed as to the impossibility of having a joint insurance in the true sense of "joint" in such circumstances as these, nevertheless, the peculiar—and, indeed, as far as appears from any authority to which we have been referred, unprecedented—character of such a contract is a thing which would lead me to construe the policy in such a way as to avoid so curious a result. However, A I need not call in aid any considerations of that kind, because the words taken by themselves, in my opinion, negative it. So much for the actual phrase to which I have referred.

Of course, the document must be construed as a whole, however, and what seems to me to be the meaning of that phrase might have to yield B to other indications in the document if that were necessary to produce a proper and fair construction of it. What is principally relied upon as indicating the joint character of the contract is the undertaking, which I have already read, to "pay to the insured the value of the property or the amount of the damage." It is said that this is a joint insurance C covering the totality of the interests of the insured, the measure of the indemnity to be provided being the value of the property or the amount of the damage, and it is said that the office has no concern with the question whether any one of the three, or any one or two of the three, could make a claim because he or they had suffered a loss. The D office is not concerned with that, it is said. It is merely concerned with the totality or aggregate of the insured, and the aggregate of their interests. Even giving that construction to the words, it does not appear to me that it really supports the argument of a joint policy. The most that it amounts to seems to me to be this. The three persons in question E having effected a composite policy, under which the individual loss of each one of them leads to an indemnity by the company, the company, when making payment, can make it, and perhaps is bound to make it, to all three. However, the manner in which the payment is made, and the persons to whom the payment is made, cannot, in my view, affect the true F nature of the contract in pursuance of which the payment is made, if the true nature of the contract is to indemnify each of the named insured in respect of his individual loss. The fact that payment falls to be made to all three of them—if that be the true construction—does not, and in my view, cannot, have the effect of turning that payment into a G payment of indemnity to all three, and for this very simple reason. In the present case, in the matter of the stock, the only persons who suffered a loss were Plant Brothers, Ltd., themselves. Nobody else suffered one penny of loss. By virtue of that loss, Plant Brothers, Ltd., become entitled to be indemnified. Nobody else had a claim to indemnity, H because nobody else had suffered a loss, and the payment, if it falls to be a payment to all three by name, is, and, in my judgment, must be, in essence a payment in discharge of that loss in respect of which the indemnity has become operative.

In my opinion, however, the clause in question, upon its true construction, does not call for a payment to all three in respect of any loss suffered, if only one be interested in that loss. It appears in the printed part of the document, and must be read in the light of the reference to the insured in the indorsement, which contains the words "for their respective rights and interests." How are that description of the insured and that description of the indemnity to which they are to be entitled to be fitted into the printed form, which uses the phrase "the insured"? It seems to me that, wherever the phrase "the insured" appeared in the printed part of this document, it would be wrong to treat that as meaning, as a matter of construction, all the three persons named in the indorsement. The printed words "the insured" must be construed and qualified, in my opinion, by the words "for their respective rights and interests," and those printed words must be given a construction which will fit in with the essential nature of the contract which is being undertaken. Accordingly, I am of opinion that the provisions as to payment must be construed as being an undertaking to pay to that one, or those two, or those three, of the named insured that indemnity to which each is entitled, having regard to the loss which he has suffered. If the loss is a loss which only one has suffered, this undertaking to pay, in my judgment, must be construed as an undertaking to pay him, and to pay him the sum which will indemnify him against his loss. Thus, in the case of Scoffin and Willmott, Ltd., as freeholders, and Plant Brothers, Ltd., as tenants at will, each of them is entitled to claim from the company, and to receive such a sum as, having regard to its individual interest in the premises, will indemnify it for the loss which it has sustained.

That is my opinion as to the construction of this clause, but, as will appear later, even if this clause be construed as a clause for the machinery of payment to all three, it would not, in my opinion, affect the result. There are other clauses in the conditions which have been relied upon, and, in my opinion, those clauses, or several of them, relied upon by the respondents confirm the view which I have taken as to the meaning to be given to the words "the insured" throughout the printed part of this policy. First of all, condition 2 provides that the policy:

> . . . shall be voided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance . . . (c) whereby the insured's interest ceases except by will or operation of law.

If the insurance be treated as a joint insurance, and the words "the insured" are to be construed as meaning the three, that clause has no effective meaning, because, the interests of the three persons being different, as I have stated them to be, I cannot see how those interests can cease except by all of them dropping out of the picture. There is no joint interest at all. Moreover, if "the insured" is construed in the way in which counsel for the appellants would construe it, one result would be that, if, for instance, a particular part of the property ceased to belong to any of the parties—for instance, if the freehold were sold and Plant Brothers, Ltd., ceased to be tenants of it—that item would

have dropped out. They would have ceased to be interested in it. Their
interests in those capacities being totally different from the interests of
the bank, on the argument of counsel for the appellants, as I follow it,
it could not be said that this clause applied to these facts. As a matter
of business and commonsense, it is quite obvious that, if the clause is
A to have any useful result at all, it must apply to such a situation.

The next condition, which is particularly relied upon by the respondents, is condition 8, which contains the usual provisions as to average :

> If at any time of any destruction or damage to any property hereby insured
> B there be any other insurance effected by or on behalf of the insured covering any
> of the property destroyed or damaged, the liability of the corporation hereunder
> shall be limited to its rateable proportion of such destruction or damage.

If the phrase " the insured " there means all three of them, that con-
dition could come into operation only if all three of them together
C effected another insurance. The condition would not come into opera-
tion if, for instance, Plant Brothers, Ltd., on their own behalf insured
part of the property with another office. The condition would not apply
if the words " the insured " referred to the three jointly. It surely must
be intended to cover the case where any individual of the three effects
D another insurance. Otherwise, there would be a serious gap in the
effectiveness of the clause. If condition 8 did not apply to such an
insurance, I cannot see by what method it would be possible, either on
the ground of contribution or on that of subrogation, for the other office
to obtain any contribution from this office, or for this office to obtain
E any contribution from the other. The true construction of the words
again, in my judgment, must be moulded by reference to the governing
phrase " for their respective rights and interests," and must be given
a businesslike effect in consequence.

The last matter relied on in the printed form is in the memorandum,
F which provides for the benefit of the insurance to pass to a purchaser
of any building who has completed his purchase. It begins with the
following words :

> If at the time of destruction or damage to any building hereby insured, the insurer
> shall have contracted to sell his interest in such building and the purchase shall
> not have been made but shall be thereafter completed, the purchaser [shall be
> G entitled to the benefit of the policy].

Surely that clause should be intended to cover the case where one of the
three persons named—namely, Scoffin and Willmott, Ltd.—sold his
freehold interest. The only way in which effect could be given to it is
by treating " the insured " again as meaning each and every of them,
H as circumstances may require.

As against that, reliance is placed by counsel for the appellants on condition 4, which calls for a notice in writing to be given by the insured, and a claim in writing to be delivered by the insured, and, if necessary, a statutory declaration by the insured. In my opinion, the obligation there lies on that one of the insured who is making the claim, or who is entitled to make the claim—namely, that one of the insured who has suffered a loss in respect of which he is entitled under the policy to claim indemnity from the company. I do not think that I need refer to any more of these conditions, because they must all of them, in my judgment, be construed on the principles which I have endeavoured to state.

That being, in my opinion, the nature of the contract, what was the position when this fire took place? First of all, let me take the building. When that fire took place, Plant Brothers, Ltd., had suffered a loss, because, as tenants at will, they had suffered the destruction of the building of which they were tenants at will. Scoffin and Willmott, Ltd., had suffered a loss in that the building of which they were the owners in fee simple, subject to a tenancy at will, had been destroyed. The fire admittedly was feloniously caused, but it was not admitted, nor was it established, or, indeed, attempted to be proved, that the crime of firing these premises was one for which Plant Brothers, Ltd., were responsible. All that was admitted was that an individual in their employment had set fire to the premises. Accordingly, so far as the claim for the premises was concerned, treated by itself, there never was any answer to it. It was a perfectly *bona fide* claim, and no exception could possibly have been taken to a claim made by Scoffin and Willmott, Ltd., in respect of their loss. As we know, Scoffin and Willmott, Ltd., did not in fact put in a claim, and for the perfectly intelligible reason that Plant Brothers, Ltd., their controlled subsidiary, were putting in a claim, and were putting in a claim on the basis that they were entitled to recover the full amount of the damage—a claim which was not contested, and which has been accepted. Scoffin and Willmott, Ltd., as a matter of business, were obviously content to allow their subsidiary to receive the money, because they were in a position to see that the businesslike thing was done, and that the money was expended, as we have been told it was expended, on re-instating the premises. The position was, therefore, as I have said, that, with regard to that claim, there was no possible answer to it either by Plant Brothers, Ltd., as tenants at will, or by Scoffin and Willmott, Ltd., as freeholders, if they had chosen to make a claim. The bank had no claim whatsoever, because they had suffered no loss in respect of the building. The damaged building was *pro tanto* replaced by the claim under the policy, which itself came under the floating charge. The bank, therefore, had suffered no loss, and so had no *locus standi* at all to make a claim. As far as the buildings are concerned, the only persons who had suffered loss, and the only persons who could call for an indemnity, were Scoffin and Willmott, Ltd., and Plant Brothers, Ltd.

The stock stands on a different footing. The only persons who could make a claim in respect of stock were Plant Brothers, Ltd. They were the only people who had suffered loss. The bank had not suffered a loss, for the reason which I have just stated. Scoffin and Willmott, Ltd., had suffered no loss, because neither as shareholders in Plant

Brothers, Ltd., nor as guarantors of the overdraft of Plant Brothers, Ltd., did the loss of the stock cause them any damage at all. Therefore, they could not make a claim, and any money paid out by the office by reason of that fire in respect of that stock cannot in its nature have been a payment in respect of a contract of indemnity in regard to loss
A by them. Those two persons have suffered no loss. The only contract of indemnity which called for a payment was the contract of indemnity under which Plant Brothers, Ltd., were entitled to claim. In their claim in respect of the stock, Plant Brothers, Ltd., were admittedly fraudulent, and it is claimed that, as they put forward one claim, and one claim
B only, in respect of the stock and premises, the fraudulent overstatement of the claim affected the whole of the claim, and brought into operation the condition in the contract under which the company was exempt from liability. I do not pause to examine the correctness of that proposition, because, in my judgment, it is not relevant to consider it
C for present purposes.

Those being the claims to which the fire gave rise, and those being the indemnities which the company had contracted to give in those circumstances, the claim is put in by Plant Brothers, Ltd., and by Plant Brothers, Ltd., alone. I am certainly not going to assume that that
D was being done without the knowledge of the bank, or without the knowledge of Scoffin and Willmott, Ltd. To make any such assumption would be to shut one's eyes to the ordinary business habits of mankind. Scoffin and Willmott, Ltd., the controlling company, with directors of their own upon the board of Plant Brothers, Ltd., must have known
E what was being done. The bank, which, as a matter of fact, held the policies, gave them up when the fire took place. The banks were local branches, and it cannot be supposed that the bank did not know all about it. They were not concerned, in any case, to make a claim, because, as I have said, they had suffered no loss. Their position was not
F affected, because, if and when Plant Brothers, Ltd., received money from the underwriters, that money would become subject to the floating charge, and the security of the bank would be as good as it was before.

On the face of it, the claim is a claim by Plant Brothers, Ltd., alone. I do not myself attach to that circumstance any conclusive importance.
G Its significance lies in the fact that it shows what the business position was, and, in my opinion, correctly expresses what the parties intended by the document itself. Strictly speaking, however, it is irrelevant to the reasoning upon which my conclusions are based. Great reliance was placed upon it by counsel for the second respondents, but I do not
H think that it is necessary, for his case, to attach too much importance to those precise facts. One further matter upon which great stress was laid was the fact that on the Lloyd's policy an indorsement was procured authorising the underwriters to pay the brokers the amount due, and that authority was signed by Plant Brothers, Ltd., alone. Again, I do not think that that circumstance has any real determining effect.

I now come to the actual matters relied upon by the plaintiffs, the appellants in this court. It is said that the money paid under the authority was paid to the three drawees of the cheques jointly, that they jointly received it, that that joint payment and joint receipt took place under a mistake of fact, and that, therefore, the plaintiffs are entitled to recover. Counsel for the appellants asserts that proposition irrespective of whether or not his construction of the policies themselves is accepted. He says that, even if the policy is not a joint policy in the sense in which he uses that phrase, but is a composite policy in the sense in which I have used that phrase, nevertheless, when the payment itself is examined, it is in truth a payment to all three. Further, he says that the quality of that payment and its true nature are to be ascertained irrespective of the construction of the policies themselves. I cannot take that view. It seems to me that the quality and the nature of what was done in the matter of payment are to be ascertained primarily by looking at the nature of the obligation in satisfaction of which the payment was intended to be made. As a rule, parties intend to perform their contracts, even though they do not perfectly understand them. When they make a payment which they conceive to be a contractual obligation, they intend to make that payment for the purpose of discharging that obligation, even if the precise nature of the obligation is obscure to them. In the present case, in my judgment, the payment which was made was intended to be, and must be regarded as being, a payment made for the purpose of discharging the contractual obligations, whatever they were, undertaken by the underwriters under the policies.

It is here that what I conceive, but what counsel for the appellants does not admit, to be the crucial question of joint insurance becomes of great importance in this matter of payment. If the insurance was a joint insurance in the sense stated by counsel for the appellants—namely, a joint indemnity and an obligation towards the three jointly—I could understand an argument which would say : " When the cheque is drawn in favour of the three jointly, and is paid to them, and is handed to them, that operates as a discharge of an obligation to all three of them. Before the payment, the three of them had a claim. After the payment, that claim was satisfied by payment." From that it would follow that it could truly be said, as it seems to me, that the money was received by the three payees in discharge of an obligation in which all three of them were interested, and in respect of which all three of them had a title to sue beneficially for themselves.

If the contract is not of that character, then what is the alternative ? It seems to me to follow of necessity that the payment by the underwriters must be regarded as a payment made in discharge of their contractual obligations to indemnify against loss. The only party who could claim such an indemnity was Plant Brothers, Ltd., subject to the complication in the question of the freehold premises, about which I

shall have a special word to say in a moment. However, if one leaves that out of the claim for a moment, Plant Brothers, Ltd., were the only people who could claim an indemnity. They were the persons beneficially entitled to that money. If that money had got into the hands of the Midland Bank, Plant Brothers, Ltd., would have been entitled to
A get it back from them. If it had got into the hands of Scoffin and Willmott, Ltd., then Plant Brothers, Ltd., would have been entitled to get it back from them. Even assuming the construction of the covenant to pay, which I have already examined, as being a covenant to pay to the three jointly, the other two would merely be recipients for the benefit
B of the person whom the underwriters had contracted to indemnify—namely, Plant Brothers, Ltd.—and they would be mere recipients, with an obligation to pass on the money to the person who had suffered the loss. Thus, whether the cheques were rightly made out, on technical reasons based on the construction of that clause, in favour of the three
C or whether they were made out, in an excess of caution and a misreading of the contract, in favour of the three does not appear to me to matter. Whichever may be the true explanation, the substance of it is that Plant Brothers, Ltd., were entitled, as between themselves and the other two, to insist upon the payment of that money over to them, and the
D other two were mere names which happened to come into the transaction.

On that basis, can it be said that the Midland Bank and Scoffin and Willmott, Ltd., received this money ? The cheque reached their hands. They in fact indorsed it. The cheque was honoured. Is that a payment to them ? I will assume in favour of counsel for the appellants that it
E is, but what is the nature of the payment ? If the cheques ought to have been made out to Plant Brothers, Ltd., alone, on the true construction of the contract, the insertion of the names of the other two was a mere mistake, and their indorsement of the cheques, in order to make the cheques negotiable in the hands of the person entitled to them
F —namely, Plant Brothers, Ltd.—could have no effect, in my judgment, in making them recipients of the money, and, therefore, liable to a claim for repayment on the ground that the money was paid under a mistake of fact. I entirely decline to accept the proposition, which counsel for the appellants was minded to put before us, that a person whose name
G is inserted by mistake in a cheque as payee, and who indorses it and hands it over to the person entitled to the payment—namely, the person who ought to have received the cheque in the first instance—is liable to repay that money to the drawer of the cheque if it turns out that the cheque was drawn under a mistake of fact. Such a conclusion appears
H to me to be one which shocks the senses, and I certainly decline to hold anything of the kind. If, therefore, these names were inserted unnecessarily *ex abundanti cautela*, recovery is quite impossible.

Supposing, on the other hand, that they were put in because, contrary to my view, the payment clause calls for actual payment to the three what would the result be on that view ? Assuming that I am right in construing this contract as a contract with each of the assured in respect of his interest to indemnify him against loss, the insertion of a clause requiring payment to the three cannot affect the rights of one of them to claim the totality, and compel us to treat the money as having been paid to the three. Their obligation being to pass it on to one of them, I cannot see how, once they have done that, a claim for repayment can be made against them. In the case of an agent, it is settled law that, once he has paid over the money to his principal, no action for money had and received, based on an allegation that the payment was made under a mistake of fact, will lie against him. I cannot see how, if money passes through the hands of persons who are mere conduit pipes and nothing else, a claim can be made against such persons if the money has passed from their hands and has come to rest in the place where it ought to be. Accordingly, in my opinion, the appeal fails, because the appellants fail to establish that the money was paid to, and received by, the Midland Bank and Scoffin and Willmott, Ltd.

In the case of the freehold, the claim made by Plant Brothers, Ltd., and paid by the office in respect of the claim of Plant Brothers, Ltd., was, in point of fact, excessive, for the reason that it was in part appropriate only to a freeholder. The loss suffered by Plant Brothers, Ltd., by the burning of the premises, of which they were only tenants at will, could not possibly have been anything like the amount which was actually paid. Everybody concerned quite clearly treated the claim as one in respect of the full interest in the property. If it be said that somewhere wrapped up in that payment there is to be found a payment in satisfaction of the claim of Scoffin and Willmott, Ltd., notwithstanding the fact that they did not specifically claim, and that, to the extent of their interest in those moneys, they must be treated as having received them, the answer, in my opinion, quite clearly is, on what ground could that money be recovered from them ? They made no fraudulent claim. The money was not paid in respect of any fraudulent claim of theirs. It was paid either without a claim at all, if it is to be treated as a payment to them, or by reference to, and in reliance upon, the claim put in by Plant Brothers, Ltd., in respect of the premises. As I have already pointed out, there was no element of fraud about that, and, even if Plant Brothers, Ltd., in their own claim in respect of the premises, had been guilty of fraud, that would not affect Scoffin and Willmott, Ltd., at all. The result, therefore, is that, even if it be right —and I do not think that it is right—to regard Scoffin and Willmott, Ltd., as recipients of part of the money paid in respect of the premises claim, I can see no ground upon which that money can be recovered from them. Indeed, there was no injustice about it whatsoever, because the claim was a perfectly good one which ought to have been honoured by the office in any event.

That really concludes all I have to say upon the substance of the matter. Many matters were argued, and many points arose, to which

I have not found it necessary to refer. I followed them, I hope, and understood them, and, if I do not deal with them specifically, it is because I find it unnecessary to do so, having regard to the view which I take.

In conclusion, I wish to put on record, that the pleadings have been amended by leave of the court, and I may here say that the amendments
A of the defences consequential on the amendments of the statement of claim are also allowed. The amendments to the statement of claim arose in this way. In para. 7 of the statement of claim, there is a reference to "the claims" which were made. In the particulars, it is stated that those claims were made by Plant Brothers, Ltd. The case made
B by counsel for the appellants, so far as it related to the making of the claims, was that the claims must be treated as having been made on behalf of all three persons named in the policies. We took the view that that case did not fall within the pleadings, because, when para. 9 is looked at, it seems clear that the claims referred to are not intended to
C be pleaded as claims made on behalf of all three, because they are said to be fraudulent claims, and there is no claim based on fraud made against Scoffin and Willmott, Ltd., and the Midland Bank, Ltd. The fraud, of course, would be a purely vicarious one, the liability, for which would arise only by virtue of the act of a fraudulent agent, in this case
D alleged to be Plant Brothers, Ltd. I do not think that the pleading as drawn really covers the case that Plant Brothers, Ltd., in putting in the claims, were acting on behalf of all three, and we allowed an amendment to enable that to be raised. The other amendment arises in this way. The payments, recovery of which is sought, are alleged to have
E been made by four cheques, the first two cheques being in respect of the buildings claim and the other two cheques being in respect of the stock claim, one cheque in each group, of course, being the cheque of the General Accident Fire and Life Assurance Corporation, Ltd., and one cheque being the cheque in respect of the Lloyd's underwriters'
F liability. Those cheques which it is said were the payments, recovery of which the plaintiffs claim, were, in the case of the Lloyd's policy, the cheques of the brokers, and, accordingly, on the pleading as it stands, it is alleged that the delivery of those cheques by the brokers made out to the three insured was a payment by Lloyd's underwriters. That
G proposition could be supported only on the hypothesis that, on the facts of this case, the brokers, in paying, were paying as agents of the underwriters. It is certainly not the case that by any custom or rule of law a broker who pays his client is paying as agent for the underwriter. The broker is the agent of the insured for effecting the policy and making
H claims, and so forth, but he is not the agent of the underwriter, and I have never heard it suggested before that, for this particular purpose of satisfying claims, the broker is the agent of the underwriter. In my opinion, the proposition is entirely unwarranted. Accordingly, it became necessary for the plaintiffs in respect of the Lloyd's policy to fall back upon an alternative case, and, on the basis that the brokers were the

agents of the insured to collect the money from the underwriters, payment to the brokers is to be treated, it is said, as payment to the agents of the defendants, and those agents paid over that money by their own cheque to the defendants. In order to enable that case to be raised, again we allowed an amendment of the pleadings, and we did so because it is extremely unfortunate, if matters go to a higher tribunal, that there should be the slightest question as to the pleading basis upon which the argument was conducted in this court. Therefore, we formally required an application for leave to amend, and we formally ruled on that application, and the amendments in writing have been allowed. In the result, the appeal fails and must be dismissed with costs.

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SCOTT, L.J.: I agree.

GODDARD, L.J.: I agree. I want to add one word in deference to the argument of counsel for the appellants with regard to the indorsement upon the cheque by the two defendants being payment. No one doubts the authority of the cases he cited bearing on the payment by bill or note of obligations. In those cases, no doubt, it is said that, where a cheque is paid in respect of an obligation, and is received as payment, it is conditional on the cheque being honoured, and, when the cheque is honoured, the payment dates back to the time when the cheque was given. However, if a cheque is given to a person who has made no claim to it, and, asserting no title to it, he has handed the cheque to the person who does assert title to it, it cannot be said that there has been any payment to that person, because there has been no obligation. There is no obligation, and the person who has received the cheque and indorsed it has not asserted a title. In truth, what the Midland Bank, Ltd., and the other company did in this case was, by putting their indorsements on the cheque, to turn the cheque from an order cheque into a bearer cheque under the Bills of Exchange Act, 1882, s. 8, so as to enable the person who did claim title to the cheque to obtain the money as on a bearer cheque.

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Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *William Charles Crocker* (for the appellants); *Simmons & Simmons* (for the first respondents); *Edward D. K. Busby* (for the second respondents).

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[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

W. R. MORAN PROPRIETARY, LTD. *v.* NEW SOUTH WALES DEPUTY COMMISSIONER OF TAXATION AND OTHERS.

[Privy Council (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Porter), **April 30, May 1, 2, 6, 7, 30, 1940.]**

Privy Council—Australia—Federal powers—Taxation—Taxation part of scheme for encouraging wheat growing—Discrimination between States—Commonwealth of Australia Constitution, ss. 51 (*ii*), (*iii*), 96—*Flour Tax* (*Wheat Industry Assistance*) *Assessment Act*, 1938 (*No.* 48)—*Flour Tax Act*, 1938 (*No.* 49)—*Flour Tax* (*Stocks*) *Act*, 1938 (*No.* 50)—*Flour Tax* (*Imports and Exports*) *Act*, 1938 (*No.* 51)—*Wheat Tax Act*, 1938 (*No.* 52) —*Wheat Industry Assistance Act*, 1938 (*No.* 53).

The appellant company disputed the payment of certain taxes imposed by the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, and the Flour Tax (Stocks) Act, 1938, on the ground that these statutes were *ultra vires* the Commonwealth Parliament and void, in that they were part of a scheme of taxation operating by way of discrimination between Tasmania and the other States contrary to sect. 51 (ii) of the Constitution. The statutes in question were part of a scheme of six Acts whereby taxes were imposed on flour and flour products, the proceeds of the taxation being distributed to the wheat growers. As, however, the quantity of wheat grown in Tasmania was relatively insignificant, in order that the inhabitants of Tasmania should not be forced to contribute to the taxes without materially participating in the benefits thereof, it was enacted that special grants were to be made to the State of Tasmania with intent that the same should be distributed among the payers of the taxes. Sect. 51 (ii) of the Constitution provides that the Commonwealth Parliament shall have power, subject to the Constitution, to make laws with respect to taxation, but not so as to discriminate between States or parts of States. Sect. 96 of the Constitution provides that the Commonwealth Parliament can grant financial assistance to any State or States (but subject to a possible time limit). In this case the distribution of the special grants was made by the Tasmanian Parliament:

Held: (i) the fact that persons in Tasmania who paid the taxes were in a more favourable position than those who paid the taxes in other States, was not in itself contrary to sect. 51 (ii) of the Constitution, as that section, though prohibiting discrimination between States or parts of States, is not concerned with the equality of burden of taxation.

(ii) the special grants having been made under sect. 96, which does not prohibit discrimination, were made *bona fide* for the purpose of equalising the burden of taxation, and the scheme as a whole did not discriminate between States or parts of States contrary to sect. 51 (ii).

[**EDITORIAL NOTE.** The Constitution of the Commonwealth provides that taxation by the Commonwealth government shall not discriminate between States. This is a negative stipulation and is held to mean that taxation shall not be levied so that it must *per se* fall more heavily on one State than another. It does not mean that taxation must be adjusted so that there shall be an equality of burden upon the States despite the difference in their natural resources and development. Inequalities arising from such reasons are to be ignored in considering the question of discrimination.

As to Federal and State Relations in the Australian Commonwealth, see HALSBURY, Hailsham Edn., Vol. 11, pp. 104-114, paras. 181-197; and for Cases, see DIGEST, Vol. 17, pp. 446-450, Nos. 182-193.]

Cases referred to:

(1) *R.* v. *Barger* (1908), 6 C.L.R. 41; 17 Digest 446, case *m.*

(2) *Cameron* v. *Deputy Federal Comr. of Taxation* (1923), 32 C.L.R. 68; Digest Supp.

Appeal by special leave from a judgment of the Full High Court of Australia, dated June 7, 1939. The facts are fully set out in the judgment of their Lordships delivered by Viscount Maugham.

A. T. Miller, K.C., and *Wilfrid M. Hunt* for the appellants.

Harold L. Murphy, K.C., and *Hon. H. L. Parker* for the respondent.

Wilfrid A. Barton, K.C., and *A. C. Nesbitt* for the intervener.

Viscount Maugham: This is an appeal by special leave from a judgment of the Full High Court of Australia, dated June 7, 1939, consisting of Sir John Latham, C.J., Rich, Starke, Evatt and McTiernan, JJ. By the judgment, it was ordered that the respondent (plaintiff in the action) do recover against the appellants the sum of £85 12*s.* for flour tax and additional tax alleged to be due to the Taxation Commissioner under the provisions of two Commonwealth Acts entitled the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, and the Flour Tax (Stocks) Act, 1938. The grounds of defence were that the appellants were not indebted as alleged, for the reason that the two Acts were invalid and ineffective as being *ultra vires* the Commonwealth Parliament. This defence raises questions of great constitutional importance.

It is not in dispute that the two Acts mentioned, together with several other Acts to be referred to later, were passed to give effect to a scheme which had been agreed between the Prime Minister of the Commonwealth and the premiers of the 6 states after a conference at Canberra. The scheme is in fact mentioned in a preamble to one of the Acts in question. Its object and purpose were to ensure to wheat growers in all the States a payable price (as it was called) for wheat, and to raise the necessary sum by imposing a tax upon flour sold in Australia for home consumption. The premiers on behalf of the States undertook to co-operate in the scheme by passing Acts in the States fixing prices for flour sold for home consumption and providing for the distribution of the proceeds of the tax among wheat growers in proportion to the quantities of wheat respectively produced by them. The millers, it was assumed, would pass on the tax to the consumers, so that the ultimate result of the scheme would be that bread and other products of flour would be a little dearer than before, while the growers of wheat would be enabled to continue in business with the assistance of payments by the Commonwealth securing to them a payable price for their wheat. Here, however, there arose a difficulty. Tasmania is in a special position, inasmuch as she alone of the States of the Commonwealth imports wheat from other States, and does so because the quantity of wheat grown in Tasmania is relatively insignificant. The result of this circumstance is that the people of Tasmania, if treated like those of the other States, would in the end have to bear the excise duty on flour by paying an increased price for bread and other wheat products, whilst that State or its inhabitants would receive very little advantage from the distribution of the proceeds of the taxes which were being imposed on flour. This difficulty was, by agreement, to be met in this way. The scheme was to provide that the tax on flour was to be levied on flour consumed in Tasmania at the same rate as on flour consumed in the other States, but provision was to be made for the relief of Tasmania as a State to an amount not greater than the tax on flour collected in Tasmania. It was intended (following a course which had been previously adopted in Tasmania) that persons who paid the flour tax there would obtain relief out of the sums to be paid by the Commonwealth to Tasmania in the manner hereafter described.

Their Lordships agree with the High Court in the view that, in the circumstances of the case, there can be no objection to examining the scheme, including the record of what was done at the conference at Canberra, and they also agree that an examination of that record does not add anything to what is apparent upon the face of the federal and State statutes. There has been no attempt to disguise, still less to conceal, what has been done in this matter, or the reasons for doing it. The scheme admittedly could not have been carried out by the Commonwealth Parliament alone, and the main question is whether, in the course of taking the predominant part in carrying out the scheme, that Parliament has infringed the Constitution. Their Lordships, however, think it right to add that, at any rate in such a case as the present, where there is admittedly a scheme of proposed legislation, it seems to be necessary, when the " pith and substance " or " the scope and effect " of any one of the Acts are under consideration, to treat them together, and to see how they interact. The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine. In the present case, the purpose and substance of the Acts as a whole, which means little more than their scope and effect, may properly be looked at. The purpose in this sense is inseparably connected with the substance. This does not mean that the court is to seek out the objects, or the purpose, still less the intentions, of the members of the Parliament or the members of the government responsible for passing the measure, but that, just as, in construing a statute, it is often necessary to ascertain the mischief which it was sought to remedy, so in such a case as the present it is necessary to examine the scheme, and to have regard to its ultimate effect or its function as shown in the various Acts, and also of course to its substance : see the majority judgment in *R.* v. *Barger* (1), at pp. 74, 75.

The scheme, as will shortly appear, was carried out by six Commonwealth Acts and by certain State Acts passed by the various States. The Acts passed by the Commonwealth Parliament imposing taxation

provide, as the Constitution requires, for uniform taxes throughout the Commonwealth, but it is contended by the appellants that those Acts are " part of a scheme of taxation operating and intended to operate by way of discrimination between Tasmania and the other States," and that such Acts and taxes are accordingly contrary to the provisions of sect. 51 (ii) of the Constitution, and are, therefore, *ultra vires* the A
Commonwealth, and void. It is convenient to mention here that a number of other objections to the Acts and the taxes were raised before the High Court of Australia and are dealt with in the judgments of that court, but they were not raised before this Board, and need not be further mentioned. B

On Dec. 2, 1938, the Commonwealth Parliament passed four Acts imposing taxes upon flour and wheat, and also an Act providing the machinery for the assessment of such taxes. These Acts are entitled, and briefly provide, as follows—namely, (i) the Flour Tax Act, 1938, which imposed a tax on flour manufactured in Australia by any person, and on C
or after Dec. 5, 1938, sold by him or used by him in the manufacture of goods other than flour, (ii) the Flour Tax (Stocks) Act, 1938, which imposed a tax on flour in excess of 1,000 lbs. held in stock on Dec. 5, 1938, by any person other than the manufacturer of the flour, (iii) the Flour Tax (Imports and Exports) Act, 1938, which imposed a tax on D
flour imported into Australia and on or after Dec. 5, 1938, entered at the customs for home consumption, and also a tax upon wheat exported from Australia on or after a date to be fixed by proclamation, (iv) the Wheat Tax Act, 1938, which imposed a tax on wheat grown in Australia and on or after a date to be fixed by proclamation sold to a wheat E
merchant, and (v) the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, which provided the machinery relating to the imposition, assessment and collection of the above taxes. These Acts were designed according to the scheme to raise money by taxing flour and flour products so as to provide a fund available for the payment of moneys to wheat- F
farmers. The tax was fixed upon the basis that 5*s.* 2*d.* per bushel of wheat on rail at Williamstown was a remunerative price, and the Acts were framed so as to secure to the wheat farmers a payment upon the basis of 5*s.* 2*d.* per bushel on rail at Williamstown. If the price of wheat rose above that amount, a tax was to be imposed on wheat so as to form G
a fund out of which moneys could be paid to millers.

On the same day, the same Parliament passed the Wheat Industry Assistance Act, 1938, another essential part of the scheme. There is a preamble to this Act, which briefly details (but without reference to Tasmania) the circumstances under which the Acts were passed and the H
general nature of the scheme which it was hoped to carry into effect. The preamble is in the following terms :

> Whereas at a conference between the Prime Minister of the Commonwealth and the premiers of the States held in Canberra, at the request of the premiers, on Aug. 29, 1938, the co-operation of the government of the Commonwealth was sought

in putting into operation a scheme to ensure to wheat growers a payable price for wheat;

And whereas the premiers on behalf of their respective States undertook that, if the Commonwealth agreed to co-operate in the said scheme, legislation would be passed by the said States providing for the fixing of such prices for flour sold for home consumption in Australia as would provide for wheat growers a payable average price on all the wheat produced by them;

And whereas in order to ensure a payable price in respect of the wheat sold for A home consumption in Australia, it was represented at the said conference that it would be necessary that a tax be imposed upon flour sold for home consumption in Australia and that the proceeds of the tax be distributed among wheat growers in proportion to the quantities of wheat respectively produced by them;

And whereas the Prime Minister on behalf of the Commonwealth agreed that the Commonwealth would co-operate in the said scheme and that any legislation necessary on the part of the Commonwealth would be submitted to the Parliament of the B Commonwealth;

And whereas legislation has been passed by the Parliaments of the States providing for the fixing of prices for flour sold for home consumption in Australia.

The most material sections of the Act were to the following effect. Sect. 5 provided for the creation of a wheat industry stabilisation fund into which should be paid all moneys to be collected under the Flour C Tax (Wheat Industry Assistance) Assessment Act, 1938, and this covered flour tax under the Flour Tax (Stocks) Act, 1938. Sects. 6 and 7 provided for payment out of that fund of certain payments to the States, respectively, of financial assistance. Sect. 14 provided for payment out of the fund to the State of Tasmania of such amount in each year by way D of financial assistance as the Minister should determine, but so that the amount so to be paid in any year should not be greater than the sum by which the amount collected in that year for flour tax under the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, in respect of flour consumed in that State exceeded the total paid to that State in E respect of that year under sects. 6 and 7, and no amount should be payable under sect. 14 in respect of any year during which no tax (subject to an exception therein mentioned) was collected under the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938. It will be noted that sect. 14 provides for special grants to the State of Tasmania in F accordance with the scheme, and these are the payments (the greater parts of which were intended to be repaid to the millers) which it is asserted in effect amount to a discrimination in favour of Tasmania.

The State Parliaments had either passed a statute, or had an applicable statute in operation, enabling them to fix the maximum prices of flour G and bread in their States. The Tasmanian Act was entitled the Flour Tax Relief Act, 1938, and, like all the other Acts, was assented to on Dec. 2, 1938. It provided that persons in the State who paid flour tax to the Commonwealth might apply to a State official for relief, and might H thereupon obtain a payment by way of relief in respect of the flour tax paid by them, or at least a large part of it. The result of the scheme of federal and State legislation is admirably summarised in the judgment of SIR JOHN LATHAM, C.J., as follows:

A federal excise duty is imposed upon flour which is paid upon the same basis by persons in all States. The proceeds of the duty go into the federal consolidated revenue. An equivalent sum is then taken from the consolidated revenue and is paid by the Commonwealth by way of financial assistance to the States of the Commonwealth, upon condition that the States apply the moneys in the assistance and relief of wheat growers. In the case of Tasmania, however, a special grant is made by the Commonwealth which is not subject to any federal statutory conditions, but which in fact, is applied, and which it was known would be applied by the government of Tasmania in paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them in respect of flour consumed in Australia.

Its ultimate purpose or effect, whichever word is preferred, is to enable growers of wheat to continue in business.

The first question to be considered is whether, inasmuch as the federal taxation Acts, the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, and the Flour Tax (Stocks) Act, 1938, do not in any way discriminate between States or parts of States, there is anything to invalidate those Commonwealth taxation Acts as being *ultra vires*. Sect. 51 (ii) of the Constitution provides that the Commonwealth Parliament shall have power to make laws " with respect to taxation, but so as not to discriminate between States or parts of States." This, it is truly said, relates only to the law-making powers of the Commonwealth. The ultimate discrimination in favour of Tasmania in this case arises, it is contended, from the Tasmanian Act above-mentioned, and the action of that legislature in relation to the sums paid to the State by the Commonwealth cannot be an infringement of sect. 51 (ii), because that section does not apply to the Parliament of Tasmania. Anything, it is suggested, will be *intra vires* provided that the Commonwealth's Taxation Act or Acts do not infringe the terms of sect. 51 (ii). With the greatest respect to those judges in Australia who may have accepted this contention, it seems to their Lordships to go too far, and certainly much further than is necessary for the decision of the present case. It would seem to justify every case in which there is a taxation Act containing no discriminatory provisions followed by an appropriation Act or a tax assessment Act passed by the Commonwealth Parliament authorising exemptions, abatements or refunds of tax to taxpayers in a particular State. It was argued before their Lordships that this would be *intra vires*. In the view of this Board, it is impossible to separate such an appropriation or tax assessment Act from the taxation Act in considering the effect of sect. 51 (ii), or to turn a blind eye to the real substance and effect of Acts passed by the Federal Parliament at or about the same time, if it appears clear from a consideration of all the Commonwealth Acts that the essence of the taxation is discriminatory. Laws imposing taxation must deal with one subject of taxation only (sect. 53 of the Constitution of the Commonwealth), and the established practice in Australia is to follow the taxation Act with an " assessment " Act providing for the collection and recovery of the tax, for exemptions, and for refunds in appropriate cases. In the opinion of their Lordships, these Acts are all laws " with respect to taxation." All " relate to taxation," and, taken together, must not discriminate between States or parts of States.

In the present case, however, the matter is not so simple. The discrimination in favour of Tasmania, if it should be so described, is effected by the exercise in combination of three powers. One is that of the Commonwealth Parliament derived from sect. 51 (ii) already mentioned. Another is that contained in sect. 96 of the Constitution, under which the Commonwealth Parliament can grant financial assist- A ance to any State or States so long as that power remains in force. The third power is that of the Tasmanian Parliament to distribute the financial assistance obtained from the Commonwealth in giving relief to persons within the State who pay flour tax. A discrimination brought about in this way is asserted to be unobjectionable, since it is not within B the prohibition on Commonwealth powers contained in sect. 51 (ii). The first answer of the appellants to this contention is that sect. 51 (ii) contains a constitutional prohibition against any discrimination as regards taxation between States or parts of States, from which it is said to follow that no grant of financial assistance can be made to any State C which would have the effect directly or indirectly of creating such a discrimination. It is impossible to accept the contention in this wide form, for sect. 51 relates to a number of powers which are conferred upon the Commonwealth Parliament as regards the laws which may be made by Parliament for the peace, order, and good government of the D Commonwealth, and these powers are expressly made "subject to this Constitution," a qualification which must include the power under sect. 96 (for a period which might be limited) to grant financial assistance to any State. So far from sect. 96 being subordinate to sect. 51 (ii), or, it may be added, to sect. 51 (iii), it would be more plausible to contend E that powers conferred by sect. 51 are subordinate to sect. 96, and that the power of Parliament under that section can be exercised even so as to effect a plain discrimination. The question then arises whether this view can be accepted with or without qualification.

In dealing with the true construction of a constitutional Act such as F we are now considering, it is necessary to bear in mind that it substitutes a federal commonwealth for a number of separate colonial governments with their own legislative assemblies and powers of self-government. Such matters as tariffs, taxation, bounties and intercommunications have to be agreed between the constituent States before federation is possible, G and it is evident that the constitution ultimately agreed upon will contain certain prohibitions intended to provide fair and equal treatment between the States, so far as that is reasonably possible in a written constitution. Without travelling into the history of the making of the Australian Commonwealth during the years from 1889 to 1900, or the special circum- H stances of the six States which, by referendum, agreed to the bill which contained the constitution, ultimately embodied in the Commonwealth of Australia Constitution Act, 1900, there can be no doubt as to the necessity for the important restrictions or powers contained in the subsections of sect. 51 :

(ii) Taxation ; but so as not to discriminate between States or parts of States.

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.

On the other hand, no one can suppose that these qualifying sentences were ever regarded as affording protection against inequality as between the States in the incidence of taxation, or in the advantages to be gained from bounties. The Commonwealth is very rich in minerals of many A
kinds, but they are, of course, unequally distributed between the States. Moreover, the climatic and soil conditions and the states of development are very different in these various areas. Uniform taxes on selected metals, or, for example, on the coal produced in the States, may impose a heavy burden on some States whilst leaving others wholly untouched, B
or only slightly affected. The same remark is true as to the agricultural produce, or the products of stock-raising, in the various States: see *R.* v. *Barger* (1), at p. 70. This was, and is, obvious, and it would be a mistake to regard the restrictions contained in sect. 51 (ii), (iii), as providing for equality of burden as regards taxation, or equality of C
benefit as regards bounties. That could, perhaps, have been achieved by provisions of a very different nature, which would have had regard to the amounts raised by taxation or the amounts of the bounties received in the different States. There was no attempt to do this in the Constitution, and subsect. (ii) provides only that taxation shall be such D
that it does not discriminate between States. As ISAACS, J., observed in *R.* v. *Barger* (1), at p. 108 (a statement approved in *Cameron* v. *Deputy Federal Comr. of Taxation* (2):

> . . . the pervading idea is the preference of locality merely because it is locality and because it is a particular part of a particular State. It does not include a E
> differentiation based on other considerations which are dependent on natural or business circumstances, and may operate with more or less force in different localities. And there is nothing, in my opinion, to prevent the Australian Parliament charged with the welfare of the people as a whole from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States.

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We must now consider sect. 96, which is found in Chapter IV, "Finance and Trade." It is in these terms:

> During a period of 10 years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament G
> thinks fit.

There are no restrictions whatever in this section, and it is clear that, while the section remains in operation, the Parliament—apart from the restrictions contained in sect. 51, which must be considered in a moment —may, in the matter of financial assistance, discriminate between H
States as much as it thinks fit.

Their Lordships have accordingly to bear in mind (i) that sect. 51 (ii) prohibits discrimination between States or parts of States, but is not concerned to deal with the matter of equality of burden, and (ii) that sect. 96 does not prohibit discrimination. It is difficult to see any

ground for an attack on the scheme, or on the various Acts which carry it into effect, in so far as that attack is really based on the exercise by the Commonwealth Parliament of its powers under sect. 96. Those powers are plainly being used for the purpose of preventing an unfairness or injustice to the State of Tasmania, or indirectly to some or all of its
A population. Such discrimination as may result between millers or their customers in Tasmania and in the other States is a by-product, so to speak, of the endeavour to equalise the burden of the legislation by diminishing the special burden on Tasmania, and it is of first importance to note that this is brought about by an exercise of power under sect. 96,
B which does not itself prohibit discrimination. Great reliance was placed by the appellants on the scheme, but, in the view of their Lordships, the scheme adds nothing to the argument, for there is nothing in sect. 51 to prevent the Commonwealth Parliament from passing measures in concert with any State or States with a view to a fair distribution of the
C burden of the taxation proposed, provided always that the Act imposing taxes does not itself discriminate in any way between States or parts of States, and that the Act granting pecuniary assistance to a particular State is in its purpose and substance unobjectionable. In other words, it seems to their Lordships, as it seemed to the High Court, that the
D various Commonwealth and State Acts, if considered together as part of an organic whole, contain nothing which is prohibited in the Constitution.

In coming to this conclusion, their Lordships wish to make it clear that, as at present advised, they do not take the view that the Common-
E wealth Parliament can exercise its powers under sect. 96 with a complete disregard of the prohibition contained in sect. 51 (ii), or so as altogether to nullify that constitutional safeguard. The prohibition is of considerable importance, and the Constitution should be construed bearing in mind that it is the result of an agreement between six high contracting
F parties, with in some respects very different needs and interests. Cases may be imagined in which a purported exercise of the power to grant financial assistance under sect. 96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in
G regard to taxation. Such an Act might well be *ultra vires* the Commonwealth Parliament. Their Lordships are using the language of caution, because such a case may never arise, and also because it is their usual practice in a case dealing with constitutional matters to decide no more than their duty requires. They will add only that, in the view they take
H of the matter, some of the legislative expedients—objected to as *ultra vires* by EVATT, J., in his forcible dissenting judgment—may well be colourable, and such Acts are not receiving the approval of their Lordships. In the present case, there seems to be no valid ground for suggesting that the sums payable to the government of Tasmania pursuant to the Wheat Industry Assistance Act, 1938, s. 14, are not

in the nature of genuine financial assistance to the State, paid for the purpose of equalising the burden on the inhabitants of Tasmania of taxation which was being imposed on all the millers throughout the Commonwealth for an end which might reasonably be considered to be both just and expedient.

Having regard to the view above expressed, it is unnecessary to deal A
with the point on which STARKE, J., primarily relied—namely, that, even if the Wheat Industry Assistance Act, 1938, s. 14, was invalid, it could be treated as severable and distinct from the other provisions of that Act, and that its invalidity would not affect the legislation as a
whole. On this difficult point, their Lordships prefer to express no B
opinion. In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondent's costs. The interveners will bear their own costs.

Appeal dismissed with costs.

Solicitors: *Young, Jones & Co.* (for the appellant); *Coward, Chance &* C
Co. (for the respondent); *Light & Fulton* (for the intervener).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

JOPLING *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **June 7, 10, 1940.**]

Revenue—Stamps—Appropriation under statutory power—Pecuniary legacy—Transfer of stock by executor—Whether chargeable as conveyance on sale—Administration of Estates Act, 1925 (*c.* 23), *s.* 41.

The executor of a will acting under the power given to him by the Administration of Estates Act, 1925, s. 41, appropriated certain stock in satisfaction of a pecuniary legacy. The will contained no power of appropriation. The transfer of the stock giving effect to such appropriation was presented for stamping, and it was contended that it should be stamped not as a conveyance on sale but with a deed stamp:—

HELD: the statutory power of appropriation did not differ in any material way from a power given by a will, and the transfer should be stamped as a conveyance on sale.

[**EDITORIAL NOTE.** It is settled by authority that an appropriation under a power given by will is in effect a sale and the document transferring the property to the beneficiary is to be stamped as a conveyance on sale. It has been suggested that an appropriation under the statutory power given by the Administration of Estates Act, 1925, s. 41, is not a sale, but this view has not been accepted, and the stamp duty on the transfer is the same in either case.

AS TO STAMP DUTY ON APPROPRIATION, see HALSBURY, Hailsham Edn., Vol. 28, pp. 462, 463, para. 978; and FOR CASES, see DIGEST, Vol. 39, pp. 280, 281, Nos. 641-651.]

Cases referred to:

(1) *Dawson* v. *Inland Revenue Comrs.*, [1905] 2 I.R. 69; 39 Digest 281, case *a*.

(2) *Foster (John) & Sons* v. *Inland Revenue Comrs.*, [1894] 1 Q.B. 516; 39 Digest 281, *648*; 63 L.J.Q.B. 173; 69 L.T. 817.

(3) *Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210; 24 Digest 593, *6266*; 61 L.J.Ch. 153; 66 L.T. 360.

(4) *Re Beverly, Watson* v. *Watson*, [1901] 1 Ch. 681; 24 Digest 593, *6268*; 70 L.J. Ch. 295; 84 L.T. 296.

(5) *Great Western Ry. Co.* v. *Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 39 Digest 280, *646*; 63 L.J.Q.B. 405; 70 L.T. 86.

CASE STATED pursuant to the Stamp Act, 1891, s. 13. The facts are fully set out in the judgment.

The appellant appeared in person.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *J. H. Stamp* for the respondents.

LAWRENCE, J.: By the will of a testator who died on Sept. 20, 1938, the appellant was given a pecuniary legacy of £5,000 free of duty. The will did not contain any power of appropriation. It was proved, and the executor appropriated certain stock to Jopling's legacy. The transfer of that stock from the executor to Jopling has been presented to the commissioners for their opinion as to the stamp duty chargeable. The question is whether the instrument of transfer is chargeable with stamp duty under the Stamp Act, 1891, s. 54, as a "conveyance on sale." The authorities show that, before the passing of the Administration of Estates Act, 1925, an appropriation by an executor of a transfer in pursuance of such an appropriation would have been chargeable under the Stamp Act, 1891, s. 54, as a conveyance on sale. That is in accordance with *Dawson* v. *Inland Revenue Comrs.* (1), which was decided by a court consisting of Palles, C.B., and Andrews and Johnson, JJ., and follows *Foster (John) & Sons* v. *Inland Revenue Comrs.* (2), and *Re Lepine, Dowsett* v. *Culver* (3) and *Re Beverly, Watson* v. *Watson* (4) were there A cited. It was decided in *Dawson* v. *Inland Revenue Comrs.* (1) that, where a legatee under a will agrees with the executor to take payment, or part-payment, of his legacy in stocks or securities of the testator, the transfer deed executed in pursuance of the agreement is a "conveyance or transfer on sale" within the meaning of the Stamp Act, 1891, B and is chargeable with *ad valorem* duty. *Re Lepine, Dowsett* v. *Culver* (3) and *Re Beverly, Watson* v. *Watson* (4) had both decided, though not upon the Stamp Act, 1891, that the substance of an appropriation by an executor was that the executor was assumed to have paid the pecuniary legacy in money and the legatee to have paid the money back to the C executor for the stocks appropriated, and it was said that the substance of the matter must be looked at.

It is now contended by the appellant that the Administration of Estates Act, 1925, has altered the law with reference to the powers of an executor to appropriate, that sect. 41 of that Act gives a new statutory power of D appropriation to a personal representative, that, when that appropriation has been made, the conveyance of the property appropriated is not a "conveyance on sale" within the meaning of the Stamp Act, 1891, s. 54, because it is, as I understand his argument, a statutory power of appropriation which has, so he says, nothing contractual in it at all, and that, E therefore, the conveyance is not a conveyance on sale, there being no sale or any other contractual element in the transaction. The Administration of Estates Act, 1925, s. 41 (1), provides as follows:

> (1) The personal representative may appropriate any part of the real or personal estate . . . of the deceased in the actual condition or state of investment thereof F at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased . . . as to the personal representative may seem just and reasonable . . . provided that . . . (ii) . . . (*a*) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person [shall be obtained].

The appellant contends that that consent is not a contractual consent G at all, and he says that it is revocable. He argues that the rights of the legatee against the personal representative are entirely different from those of a purchaser against a vendor, and that, although he may have certain rights against the personal representative as his trustee, yet they are rights of an entirely different nature, and their nature indicates H that the conveyance which has to be made to give effect to the appropriation is not a conveyance on sale. On the other hand, it has been contended on behalf of the respondents that there was ample consideration for this conveyance on sale—namely, that, when the legatee consented to the appropriation, he discharged the personal representative or executor *pro tanto* from his obligation to pay the pecuniary legacy. Reliance was placed upon *Re Lepine, Dowsett* v. *Culver* (3) and *Re Beverly, Watson* v. *Watson* (4) as showing what the substance of an appropriation was, and that the substance of an appropriation had always been regarded as a sale by the executor to the legatee. In addition to *Re Lepine, Dowsett* v. *Culver* (3) and *Re Beverly, Watson* v. *Watson* (4), reliance was placed on *Great Western Ry. Co.* v. *Inland Revenue Comrs.* (5), in which it was held that a transfer in pursuance of an amalgamation agreement which had been confirmed by an Act of Parliament was a conveyance on sale, and *Foster (John) & Sons* v. *Inland Revenue Comrs.* (2), which was followed by *Dawson* v. *Inland Revenue Comrs.* (1), and in which it was held that a deed of transfer from individuals who were partners to a corporation in consideration of the stocks and securities which were the property of the partnership in consideration of shares in the new corporation was a conveyance on sale.

In my opinion, the power of appropriation which is conferred by the Administration of Estates Act, 1925, does not differ in any material degree from that which existed before the passing of that Act. It appears to me that, when the executor makes up his mind to appropriate, and gets the consent of the legatee to that appropriation, there is the element of contract. In my opinion, there is consideration to support that element of contract, and it makes no difference that the transaction is authorised by the Administration of Estates Act, 1925. The substance of the matter is that the executor proposes an appropriation, and the legatee consents to it, and, in consenting, discharges the executor from his obligation to pay the legatee in money. In my opinion, in accordance with the authorities to which I have alluded, for the purposes of the Stamp Act, 1891, that amounts to a conveyance on sale, and I see nothing in the terms of the Administration of Estates Act, 1925, s. 41, which is inconsistent with that view. For these reasons, I must dismiss the appeal.

Assessment affirmed and appeal dismissed. No order as to costs.

Solicitors: *Trower, Still & Keeling* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

LEE *v.* HAY'S WHARF, LTD. (PROPRIETORS).

[Court of Appeal (MacKinnon and Clauson, L.JJ.), **June 10, 11, 1940.**]

County Courts—Removal of action in High Court—Action in County Court under Employers' Liability Act, 1880—*Concurrent common law action in High Court—County Courts Act,* 1934 (*c.* 53), *s.* 111.

On Oct. 12, 1939, the plaintiff's husband died as a result of injuries received while in the employ of the defendants. The plaintiff thereupon commenced proceedings in the county court under the Employers' Liability Act, 1880, and concurrently therewith began a common law action in the High Court for negligence, the issues of law and fact in both cases being identical. She then applied for an order under the County Courts Act, 1934, s. 111, for the removal of the former action to the High Court. An order for such removal was made by the master, but was set aside by the judge, who held that he was bound so to do by the authority of *Munday* v. *Thames Ironworks Co.* (1):—

Held: the decision in *Munday* v. *Thames Ironworks Co.* (1), being a decision under the rigid provisions of the County Courts Act, 1846, s. 90, ought no longer to be treated as a binding authority, since the present statutory provisions gave an absolute discretion in such a case in place of the limited discretion under the earlier Act. In the circumstances of this case, the county court proceedings ought to be removed into the High Court.

[**EDITORIAL NOTE.** Under the County Courts Act, 1846, s. 90, there was a prohibition against removal of actions from the county court to the High Court unless exceptional circumstances justifying the removal were shown, and that was the ground upon which *Munday* v. *Thames Ironworks Co.* (1) was decided. The rigour of that provision has since been much altered, first by the County Courts Act, 1888, s. 126, introducing a permission in the place of a prohibition, and then by the County Courts Act, 1934, s. 111, giving the court a wide discretion to order removal. It is here held that *Munday* v. *Thames Ironworks Co.* (1), being decided under the 1846 Act, is no longer an authority preventing the court from exercising the wide discretion given by the 1934 Act, although the facts are similar to those in *Munday's* case (1).

As to Removal of Action from County Court to High Court, see HALSBURY, Hailsham Edn., Vol. 8, pp. 388, 389, paras. 826, 827; and for Cases, see DIGEST, Vol. 13, pp. 543-546, Nos. 968-1010. See also THE NEW COUNTY COURT PRACTICE, 1940, pp. 158-161.]

Cases referred to:

(1) *Munday* v. *Thames Ironworks Co.* (1882), 10 Q.B.D. 59; 34 Digest 235, *2010*; 52 L.J.Q.B. 119; 47 L.T. 351.

(2) *Challis* v. *Watson*, [1913] 1 K.B. 547; 13 Digest 544, *989*; 82 L.J.K.B. 529; 108 L.T. 505.

Interlocutory Appeal by the plaintiff from an order of Stable, J., dated May 24, 1940, reversing an order of Master Ball, dated May 9, 1940. The plaintiff was the widow of a workman who was killed by accident while working for the defendants. On Apr. 4, she commenced an action against the defendants in the Southwark County Court under the Employers' Liability Act, 1880, for her benefit and for that of an adopted son. On Apr. 3, she also commenced an action in the High Court under the Fatal Accidents Acts, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging negligence. The issues of fact and of law were identical, except that the defence of common employment was not raised in the county court action. The plaintiff applied to the master for an order that the county court action be removed into the King's Bench Division under the County Courts Act, 1934, s. 111, on the grounds that the trial would be difficult and A complicated, that, to deal adequately with the technical matters involved, several expert witnesses on both sides would necessarily have to be called to give evidence, that the defendants' liability to compensate the plaintiff was alternative in the two actions, and that, in the event of her failing in the common law action, it would be proper B and desirable, with the facts and witnesses already before the court, for the county court action to be tried subsequently in order to save expense, costs and time. On May 9, the master ordered that the county court action be removed into the King's Bench Division, but, on May 24, the judge, on appeal by the defendants, ordered that the master's C order be set aside. The plaintiff appealed.

H. H. Harris for the appellant.

R. T. Monier-Williams for the respondents.

MACKINNON, L.J.: I gather that, if STABLE, J., had not felt that D he was bound by authority, he would have been of opinion that the master's order in this case was right. His attention was drawn to *Munday* v. *Thames Ironworks Co.* (1), decided in 1882 by MANISTY and DENMAN, JJ. In that case, there was an application similar to that in the present case, and the judges there held, according to the head- E note:

> . . . that the power of removal ought only to be exercised in exceptional cases, and that no such special grounds had been shown as to induce the court in its discretion to grant the application.

The judges there acted under the powers given to them by the County F Courts Act, 1846, which established the county courts. Sect. 90 of that Act provides as follows:

> And be it enacted, that no plaint entered in any court holden under this Act shall be removed or removable from the said court into any of Her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed £5, and then only by leave of a judge of one of the said superior courts, G in cases which shall appear to the judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit.

That was, therefore, a prohibition of any transfer, unless exceptional circumstances were shown.

H The rigour of that section has since been very much altered, first of all in the County Courts Act, 1888, s. 126, which started, not with a prohibition, but with a permission:

> It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the court under the provisions of this Act if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court [upon such terms as the judge may think fit to impose].

The wideness of discretion given to judges in that section has been stated in even broader terms, if possible, in the present relevant section, which is the County Courts Act, **1934**, s. 111, which provides as follows :

> (1) The High Court or a judge thereof may order the removal into the High Court, by writ of certiorari or otherwise, of any proceedings commenced in a county court, if the High Court or judge thereof thinks it desirable that the proceedings should be heard and determined in the High Court. A

I gather, as I have already said, that Stable, J., did think it desirable that this case should be heard and determined in the High Court, but he thought that he was bound to decide otherwise by the decision in *Munday* v. *Thames Ironworks Co.* (1). It is perhaps relevant also to B observe that in *Challis* v. *Watson* (2), where the section concerned would have been that of the County Courts Act, 1888, the court held [p. **547**]:

> The section gives an absolute discretion to the High Court to consider, having regard to all the circumstances, whether it is desirable that the action should be tried in the High Court or remain in the county court.

C

In these circumstances, it seems to me that the decision in *Munday* v. *Thames Ironworks Co.* (1) ought not now to be treated as a binding authority preventing a judge from exercising the absolute discretion which he is now given in circumstances which happen to be the same as those in *Munday* v. *Thames Ironworks Co.* (1)—namely, the starting D of proceedings under the Employers' Liability Act, 1880, and a concurrent action at common law in the High Court. I think that Stable, J., was not prevented by *Munday* v. *Thames Ironworks Co.* (1) from exercising his discretion in the way in which the master did, and in the way which I think the judge desired to do. That being so, I think that this appeal E should be allowed.

Clauson, L.J.: I agree.

Appeal allowed with costs of the appeal, the costs of the applications to the judge in chambers and to the master to be costs in the cause.

Solicitors: *J. S. I. Rabin* (for the appellant); *Clifford-Turner & Co.* (for the respondents). F

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

SIVYER *v.* AMIES.

[CHANCERY DIVISION (Crossman, J.), **May 29, 30, June 13, 1940.**]

Landlord and Tenant—Recovery of possession—Procedure before magistrates —Evidence required to be taken on commission—No power in justices to order evidence to be taken on commission—Right of party to obtain declaration in High Court—Small Tenements Recovery Act, 1838 (c. 74).

The landlord of certain premises contended that they were held under a weekly tenancy at a rent of 5*s.* per week, and applied to the justices for an order for possession under the Small Tenements Recovery Act, 1838. The tenant contended that the tenancy was a yearly one, and that proceedings under that Act were not available to the landlord. To prove the facts of the tenancy, the evidence of a man over 80 years of age and unable to leave his house was necessary. This evidence could not be given on an application to the justices, since they had no power to order the evidence to be taken on commission. The landlord refused to bring proceedings in the county court. The tenant thereupon issued a writ in the High Court claiming a declaration that the premises were held on a yearly tenancy, a declaration which the tenant could not obtain in the county court. The landlord asked for an order that the action might be dismissed as vexatious and an abuse of the process of the court:—

HELD: in the circumstances, the action was properly brought, and was neither vexatious nor an abuse of the process of the court.

[**EDITORIAL NOTE.** An application to the justices under the Small Tenements Recovery Act, 1838, is both a convenient and a cheap method of recovering possession of property let at a rent within the limits fixed by the Act. It is obvious that no one would wish this remedy to be circumscribed in any way, or that concurrent proceedings could be taken in the High Court. However, in a case like the present, where, for a particular reason, justice cannot be had before the justices, it is only right that, where the landlord will not bring his proceedings in the county court, the tenant should be allowed to bring proceedings in the High Court, the only court in which the matter can be properly tried.

AS TO RECOVERY OF POSSESSION UNDER THE SMALL TENEMENTS RECOVERY ACT, 1838, see HALSBURY, Hailsham Edn., Vol. 20, pp. 283-285, para. 319; and FOR CASES, see DIGEST, Vol. 31, pp. 548-550, Nos. 6951-6968.]

Cases referred to:

(1) *Grand Junction Waterworks Co.* v. *Hampton Urban Council,* [1898] 2 Ch. 331; 30 Digest 148, *223*; 67 L.J.Ch. 603; 78 L.T. 673.

(2) *Stannard* v. *St. Giles, Camberwell (Vestry)* (1882), 20 Ch.D. 190; 28 Digest 370, *52*; 51 L.J.Ch. 629; 46 L.T. 243.

(3) *Queen's Club Gardens Estates, Ltd.* v. *Bignell,* [1924] 1 K.B. 117; 31 Digest 447, *5932*; 93 L.J.K.B. 107; 130 L.T. 26.

(4) *Shackleton* v. *Swift,* [1913] 2 K.B. 304; 33 Digest 272, *1896*; 82 L.J.K.B. 607; 108 L.T. 400.

(5) *Barraclough* v. *Brown,* [1897] A.C. 615; 30 Digest 148, *222*; 66 L.J.Q.B. 672; 76 L.T. 797.

PROCEDURE SUMMONS in which the defendant sought to have an action for a declaration of tenancy dismissed as frivolous, vexatious, and an abuse of the process of the court.

F. Mattar for the applicant, the defendant to the action.

Neil Lawson for the respondent, the plaintiff in the action.

Mattar: The defendant asks to have the action dismissed as vexatious and an abuse of the process of the court. The matter upon which the plaintiff is suing in the High Court—namely, for a declaration that the premises occupied by the plaintiff are held on a yearly tenancy at £13 per annum—will be determined by the proceedings which the defendant has already instigated before the justices at Rye Petty Sessions, and with which the justices have refused to deal because a writ has been issued for this High Court action. The defendant is availing herself of the Small Tenements Recovery Act, 1838, which provides a speedier and cheaper means of proceeding, and the plaintiff is attempting to oust the jurisdiction of this summary tribunal by bringing this action. The Small Tenements Recovery Act, 1838, provides a suitable protection for a tenant if he is entitled to possession, and if a warrant for possession should be given to the landlord. In *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1), following *Stannard* v. *St. Giles, Camberwell* (*Vestry*) (2), it was held that a court will not interfere by way of injunction or declaration of right where the legislature has pointed out a mode of procedure, except in very special circumstances. In bringing this action, the plaintiff is attempting to oust the method which is indicated by statute, and which is suitable and cheaper. [Counsel referred to *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (3).]

Lawson: The plaintiff has refused to go before petty sessions, as evidence which is material to his case cannot be given except on commission, which is possible before petty sessions only in special circumstances in criminal cases. The defendant has refused to agree to proceedings in the county court, and it is necessary to bring this action to protect the tenant's right. The court is very sparing of stopping preliminary proceedings: *Shackleton* v. *Swift* (4). There was a historical reason for the Small Tenements Recovery Act, 1838. When it was passed, there were no county courts, and the High Court procedure was very complicated. There are many cases of concurrent jurisdiction today, and, if the argument of counsel for the applicant is allowed, it could be said that, whenever there were two concurrent jurisdictions, the cheaper and lower must be sought. *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1) and *Stannard* v. *St. Giles, Camberwell* (*Vestry*) (2) dealt with offences where the tribunal is indicated in the Act which actually creates these offences. [Counsel referred to *Barraclough* v. *Brown* (5).]

CROSSMAN, J.: The indorsement on the writ in the action claims a declaration that the premises now occupied and used by the plaintiff as a wood store, garage and workshop, and situate at Mill House, Northiam, in the county of Sussex, are held by the plaintiff from the defendant upon a tenancy from year to year at an annual rent of £13. The defendant is the owner of the premises, and the plaintiff is in occupation of them as tenant of the defendant. The plaintiff claims he is a yearly tenant at an annual rent of £13, while the defendant claims

that the plaintiff is a weekly tenant at a weekly rent of 5*s*. In Nov., 1939, the defendant served on the plaintiff a notice to quit the property. The notice was based on the defendant's contention that the plaintiff is a weekly tenant. Subsequently the defendant served on the plaintiff a notice in the form set out in the schedule to the Small Tenements
A Recovery Act, 1838. This Act recites as follows:

> Whereas it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy . . .

Then the side-note of the statute is as follows:

B

> When tenant or occupier of premises where there is no rent, or where the rent does not exceed £20 a year, refuses to give possession, the landlord may give him notice of his intention to proceed to recover possession . . .

The notice referred to is the notice in the form set forth in the schedule to this Act, and it is a notice of the intention of the landlord to proceed
C to recover possession under the authority, and according to the mode, prescribed in the Act. Then the side-note is as follows:

> If tenant does not appear, or fails to show cause why he does not give possession, the justices may issue their warrant directing the constables to give the landlord possession.

D Then sect. 2 provides for the manner in which the summons is to be served, and sect. 3 provides that the execution of the warrant for possession may be stayed if the tenant takes certain steps, because the obtaining of the warrant is to be deemed to be a trespass by the landlord against the tenant if the landlord had not, at the time of the granting
E of the same, lawful right to the possession of the premises. In effect, if the justices grant the warrant—and it is contemplated that they may—in a case where the landlord is not entitled to possession at all, the landlord is to be deemed to be a trespasser, and the tenant is to be entitled to recover damages against him in an action of trespass,
F —presumably in the High Court, at the date when this Act was passed—but the tenant has to give security, to be approved by the justices, in such sum as shall seem to the justices reasonable, having regard to the value of the premises and to the probable costs of an action. The tenant is to pay all the costs of the proceeding in such action in case
G a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action or become non-suit therein, and execution of the warrant shall be delayed until judgment shall have been given in such action of trespass, and if, upon the trial of such action of trespass, a verdict shall pass for the plaintiff, such verdict and judgment thereupon
H shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in that action of trespass. It is a very interesting procedure, because it apparently contemplates giving the tenant something in the nature of a right of appeal if the justices grant the warrant against him, and the appeal would depend upon whether or not the tenant was in a position to show that the landlord was not entitled to

possession, which would be the question to be determined here, because the tenant does not admit now that the landlord is entitled to possession. If the tenant is right in saying that he is a yearly tenant, no sufficient notice has been given, and the landlord is not entitled to possession.

The schedule to the Act is in this form :

> I [the owner] do hereby give you notice, that unless peaceable possession of the tenement situate ——, which was held of me, or of the said —— under a tenancy from year to year . . . which expired [or was determined] by notice to quit from the said —— on the —— day of ——, and which tenement is now held over and detained from the said ——, be given to —— on or before the expiration of 7 clear days from the service of this notice, I —— shall on —— next the —— day of —— at —— of the clock of the same day, at ——, apply to Her Majesty's justices of the peace acting for the district of ——, in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

I propose to call that the statutory notice. The landlord has to serve it upon the tenant before he has any right to get the justices to grant a warrant for possession. The notice which the landlord served upon the tenant in Dec., 1939, was in the correct form. On Jan. 10, 1940, the justices heard the defendant's application, and they were not satisfied that, even on the basis that the plaintiff was a weekly tenant, the notice to quit which had been given was effective, whereupon the defendant's solicitor withdrew the application

On Jan 15, 1940, the plaintiff's solicitors wrote to the defendant's solicitors as follows :

> With reference to your application to the justices on Wednesday [Jan. 10, 1940], we understand it is your client's intention to serve a fresh notice to quit and to take further proceedings. We mentioned to the clerk to the justices that had the application proceeded, we should have had to ask for the evidence of Mr. Roberts, the original tenant, who is over 80 and quite unable to leave his house, to be taken on commission. He informs us, however, that the justices have no power to do this except in criminal cases, and, so far as we can trace, he appears to be correct. As our client feels that it is your client's desire as much as his own that a just decision should be reached, we are instructed to ask that your client takes any further proceedings she may deem necessary in the county court, which has proper mechanism for taking the evidence of a material witness unable to attend.

I understand that it is accepted by counsel on each side that the justices' clerk was quite correct in stating that the justices had no power in this case to take any evidence on commission, so that, on an application to the justices under this Act, the evidence of Roberts, the plaintiff's witness, would not be available, and the plaintiff would have to do without it. Whether or not, on that being represented to the justices, they would have continued to hear the case I do not know, but, if they had continued to hear the case, and if they had proceeded without it, it may be that the plaintiff's case would not have been properly heard, and it would have been necessary for him to appeal. That is to say, it would have been necessary to take proceedings against the defendant for trespass.

On Jan. 17, 1940, two days later, the defendant's solicitors wrote to the plaintiff's solicitors as follows :

> We are in receipt of your letter of the 15th inst. and note what you say. We should point out, however, that our client is anxious to obtain possession with

as little delay as possible and for this reason we cannot agree to fall in with your suggestion of making the application in the county court. We regret the position in which you find yourselves with regard to the evidence of Mr. Roberts, but fear that this fact cannot alter our intention to proceed under the Small Tenements Recovery Act as our client desires the matter to be brought to a speedy conclusion. We have to-day posted the notice to quit to your client.

On the same day, Jan. 17, 1940, the defendant's solicitors served on the plaintiff a fresh notice to quit. The notice was again based on the defendant's contention that the tenancy was a weekly tenancy and not a yearly tenancy. It is accepted by both sides that the plaintiff could not have commenced these proceedings in the county court, where no doubt they would have been cheaper proceedings, because the county court would have no jurisdiction to make a declaration of title. Therefore, he could not take proceedings under the Small Tenements Recovery Act, 1838. He could not take proceedings in the county court. The only thing he could do, if he was going to take the initiative in getting the matter determined as he wished in his favour, was to take proceedings in the High Court for a declaration of title. On Feb. 5, 1940, the defendant's solicitors served on the plaintiff a fresh notice under the Small Tenements Recovery Act, 1838. The date for the hearing of that application would have been Feb. 21, 1940. On Feb. 6, 1940, the writ in this action was issued. The defendant's solicitors had been informed of the writ as far back as Jan. 25, 1940. On Feb. 12, 1940, the defendant's solicitors wrote to the plaintiff's solicitors as follows :

We are in receipt of your letter of the 7th inst. and now return to you the original writ duly indorsed.

That was indorsed with an undertaking to accept service. Again, nothing whatever was said as to any objection to the action. On Feb. 17, 1940, the defendant took out this summons asking that this action might be dismissed, on the ground that it was vexatious and an abuse of the process of the court. That is an appeal to the general jurisdiction of the court, and an appeal to have exercised in favour of the defendant in the action what is admittedly a discretion on the part of the court to stop the action *in limine* before any step has been taken, and to prevent the plaintiff from proceeding with it in any way.

On Feb. 21, 1940, the defendant's application came before the justices for the petty sessional division of Rye, who, on the hearing of the action, declined to hear the defendant's application until the action was disposed of. Counsel for the applicant stated frankly that he does not contend that the action is one which must fail, but, without admitting that, he says that the action is vexatious because, by bringing it, the plaintiff has attempted to oust the jurisdiction of the justices under the Small Tenements Recovery Act, 1838. He says that the matter is one which should be determined in the way pointed out by Parliament, and he relies on the judgment of STIRLING, J., in *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1). The headnote in that case is as follows :

The court will not interfere by way of injunction or declaration of right where the legislature has pointed out a mode of procedure before a magistrate; unless (it seems) in very special circumstances.

The passage upon which counsel for the applicant relies is at p. 345, where the judge quotes a passage from the judgment of Sir George Jessel, M.R., in *Stannard* v. *St. Giles, Camberwell* (*Vestry*) (2), and says:

> Now, whether or no there be jurisdiction in the court to restrain by injunction A such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution . . .

That application was not an application, such as the present one, to stay an action *in limine* and to prevent its going on at all. It was a summons to have determined before the trial of the action with witnesses B a point of law which arose admittedly upon the face of the pleadings. The defendants had set out in their pleadings:

> The defendants object to the bringing of this action against them by the plaintiff company and submit the same is entirely without precedent and will contend at the trial: (*a*) That this court has not having regard to the matters hereinbefore men- C tioned and to the provisions of the Judicature Acts and the rules of the High Court made thereunder any jurisdiction to make the declaration prayed for herein. In the alternative (*b*) that the court in the exercise of its discretion ought not to make the said declaration, but that the plaintiff company should be left to establish their defence (if any) before the special tribunal entrusted with the determination of the question involved in pursuance of the statutes in that case made and provided subject to their right of appeal to a Divisional Court of the High Court of Justice provided for by the Judicature Act, 1873, s. 45, the decision of which said court is by D sect. 47 of the said statute made final and without appeal.

The matter, as I have said, came before Stirling, J., upon a summons to have a question of law raised by the defence decided before the action was further proceeded with. It was not an application to stop the action before the pleadings. Here the statement of claim and defence E had been delivered, and the claim here depended upon the Public Health (Buildings in Streets) Act, 1888, s. 3, which provides as follows:

> . . . it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or F building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority.

What was suggested here—and it seems to me to be fairly obvious— G was that that section contemplated proceedings before a court of summary jurisdiction to recover the particular penalty which was enacted as recoverable for a breach of the particular provisions laid down in the section. What the plaintiffs were doing here was endeavouring to avoid what I think is the obvious intention of the section H and to go to the High Court and ask for a declaration as to what the tribunal which would have to determine whether or not the 40*s*. per day was to be recovered ought to determine. Stirling, J., said, in *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1), at p. 345:

> . . . and I respectfully adopt the language of Sir George Jessel, M.R. in that case [p. 196]: "Where the legislature has pointed out a mode of proceeding before a magis-

> trate it is not, as a general rule, for another court to interfere to stop that proceeding by injunction." I desire to add that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually resorted to, or resorted to in the absence of very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or public authorities were, when a cheap and speedy mode of settling a dispute is provided by the legislature, to resort to a more expensive one. I think, therefore, that, in the exercise of the discretion which is vested in the court, it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the legislature has pointed out that as the proper mode of proceeding; and *a fortiori* it seems to me that when the court is simply asked to make a declaration of right, without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances. [His Lordship then considered the question whether upon the materials before him any special circumstances were shown, and continued]: This is a case in which, in the exercise of its discretion, the court ought not either to interfere by way of injunction or to make a declaration in accordance with the prayer in the statement of claim, but ought to leave the matter to the decision of the tribunal which has been pointed out by the Act of Parliament. This will lead to an adjudication by a Divisional Court, as similar questions have already been decided by Divisional Courts on similar applications.

Then the defendant's counsel asked for an order under R.S.C., Ord. 25, r. 3, dismissing the action with costs, on the ground that the decision on the point of law substantially disposed of the whole action, and, upon counsel for the plaintiffs stating that they desired to put an end to the matter at once, the judge dismissed the action with costs.

It seems to me that that is a wholly different case from the present one. That was a decision as to what the court would in fact determine in the action, and that court came to the conclusion that it was a case where it would not make an order in favour of the plaintiffs—that is to say, the plaintiffs could not succeed—and, in those circumstances, it necessarily followed that the action came to an end. That was not a case where the court was asked, before considering the action, to stay it altogether. If counsel for the applicant had been able to support the contention that this was an action in which the plaintiff could not succeed—he does not contend that, and I think that he is quite right—the matter would have been entirely different. I think that he would have been entitled to the order for which he asks in his summons. However, here, in the first place, I am not satisfied that the Small Tenements Recovery Act, 1838, is in the least in the same position as that of the Public Health Act, 1888, and that what the Act has given is an opportunity to a landlord, in certain circumstances, if he chooses to do so, to proceed in a way which may be inexpensive, and not as in the case of the Public Health Act, 1888, s. 3, where it is laid down that something must not be done, and provides what is to happen if it is done, and the penalty for doing it. That seems to me to be an entirely different proceeding from the enactment with which I have to deal here. I do not find in this Act any compulsion upon any party to submit to this form if an applicant under the Small Tenements Recovery Act, 1838, can get a decision by proceedings which may be cheaper and better for him, but I do not see why, in an ordinary case, the respondent to such an application should be prevented from claiming to have the ordinary rights of a citizen to come to the King's courts to have the question determined. It is true that the plaintiff in this action is claiming something which he is only given the right to claim under R.S.C., Ord. 25—namely, a declaration of right, with no other relief. It may be that he may fail at the trial of the action, but he is entitled to come and claim that for which he asks. I find here exactly that to which Stirling, J., was alluding in his extremely accurate and careful way when he spoke about excluding the case of special circumstances. I find here circumstances which would make it possibly a miscarriage of justice to forbid the plaintiff to take these proceedings. The plaintiff's case is that he has a witness, upon whom, I presume, he relies in support of his case, who is an old man, who cannot give evidence in court, who could not be called, and whose evidence could not be taken except on commission. It is accepted by both sides that that witness's evidence could not be taken before the justices, that the defendant himself will not take the proceedings, or has refused to take these proceedings, in the county court, and that the plaintiff cannot proceed in the county court, because he cannot get a declaration there.

The result is, as it seems to me, that the plaintiff in this case is driven to issue this writ as the only means of getting his case decided in what he thinks is the fairest way. In those circumstances, I do not see how, in the exercise of my discretion, I could say that this was a case in which I ought to dismiss this action *in limine* as being vexatious. In view of what may happen hereafter, I do not propose to say anything about the merits of the case. All I will say is that I think that this is a summons which ought to be dismissed.

Summons dismissed. Costs to the plaintiff in any event.

Solicitors: *Hunt & Hunt* (for the applicant); *Edwin Coe & Calder Woods*, agents for *William Dawes & Co.*, Rye (for the respondent).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

WILLIAMS *v.* MERCER.

[Court of Appeal (Luxmoore and Goddard, L.JJ., and Morton, J.), **June 24, 1940.**]

Emergency Legislation—Lighting restrictions—Prohibition against illuminating advertising sign—Whether requiring alteration or amendment to sign—Right of licensee to determine licence to erect sign—Lighting Restrictions Order, 1939 (*S.R. & O.*, 1939, *No.* 1098).

By an agreement dated Oct. 18, 1937, the plaintiff granted the defendant a licence to erect an advertising sign upon the wall of a building. The agreement provided, *inter alia*, that, if the local authority or any other authority lawfully empowered to do so should require the sign after erection to be taken down, removed, altered or amended, the defendant should have the right to determine the agreement on giving one month's notice. The sign which was erected in pursuance of the agreement concerned the defendant's business, and was illuminated by neon lighting, which might be turned on or off at will. By reason of the Lighting Restrictions Order, 1939, such illumination became unlawful, and the defendant thereupon gave notice to determine the agreement in accordance with the above provision :—

HELD : the order being merely a prohibition against illuminating the sign, it could not be said that, on the true construction of the agreement, the defendant had been required to alter or amend the sign.

[**EDITORIAL NOTE.** The general position of lessees and licensees is that their obligations under the lease or agreement are absolute, and it is no answer to an action to enforce them that the benefit of the lease or licence has been lost to the lessee or licensee by reason of government action. In the present case, therefore, the only issue is whether one of the events provided for in the clause for determination of the licence had happened. This, of course, is purely a question of construction of the clause itself.

AS TO EFFECT OF WAR RESTRICTIONS ON CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 215-217, para. 296 ; and FOR CASES, see DIGEST, Vol. 12, pp. 379-381, Nos. 3131-3148.

APPEAL by the defendant from a judgment of His Honour JUDGE DOWDALL, given in the Liverpool County Court on Mar. 14, 1940. The facts are fully set out in the judgment of LUXMOORE, L.J. The county court judge found that, though the lighting restrictions order impeded the most effective use of the sign by illumination, it did not require the alteration or amendment of the sign, and that, therefore, the lessee could not take advantage of cl. 4 of the lease, which allowed him to determine the lease if a competent authority required him to remove, alter or amend the sign. The defendant appealed.

H. Diamond for the appellant.

G. B. H. Currie for the respondents.

LUXMOORE, L.J. : The claim in this case was to recover a quarter's rent in respect of an advertisement station, and the defence was : "I put an end to the agreement under which I had the right to use this advertisement station by giving a notice in accordance with the terms of that agreement." The agreement dated Oct. 18, 1937, is described as a lease, the plaintiffs being described as the lessors and the defendant as the lessee. By cl. 1, the lessors demised to the defendant Mercer full right and liberty for him and his permitted assigns or licensees, to erect and use upon that part of the wall of the said building an advertising sign. The term of the licence was for 5 years from Nov. 1, 1937, at a yearly rent of £45, payable in advance by quarterly instalments.

The agreement contained a number of covenants. The only material ones are a prohibition that the defendant should not erect upon the site any advertising sign unless the same and the specifications thereof should first have been submitted to the lessors and a named insurance company and their approval in writing had been obtained. He was not to substitute any other sign for that of which the lessors and the insurance company had given their written approval. Then the material clause is in the proviso, which provides :

> Provided always and it is hereby declared that if during the term hereby created or any continuation thereof the lessors shall be served with any notice or order by the local authority requiring them to rebuild, alter, repair or amend the said site or any part thereof, or any part or parts of the buildings attached thereto . . . which would interfere with or prevent the user of the said site as an advertising sign [the rent is to cease] and be suspended for so long as the said premises are not available [for use as an advertising site].

Then there is a second proviso :

> . . . if the local authority, or any other authority lawfully empowered to do so shall . . . require the said sign after erection to be taken down, removed, altered or amended, then the lessee shall have the right to determine this lease by giving one month's notice of such desire, and immediately on the expiration of such notice the present demise and everything herein contained shall cease and be void, but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of contract.

After that had been assented to, the defendants erected an advertisement on the advertising site. It was a large square board, which had on it : "Mercer's Furniture and Carpet Galleries, entrance 60 Hanover Street." There was a hand underneath pointing to Hanover Street. It was a sign capable of illumination by the use of neon lighting. As I understand it, the illumination might be turned on or off at will.

By the Lighting Restrictions Order, 1939, which was passed on Sept. 1, 1939, it was provided as follows :

> No person shall, for the purpose of advertisement or display, cause or permit any sky-sign, facia or advertisement, to be illuminated or any light to be displayed outside or at the entrance to any premises, or on any hoarding or similar structure.

After that order was passed, it was illegal for the defendant to illuminate his neon sign. On Dec. 15, 1939, by his solicitors, he gave a notice to the plaintiffs by which he purported to determine the tenancy agreement, under the proviso in cl. 4 which I have already read. They said :

> We have been informed by our client that the rent has been paid in advance up to Feb. 1 next. In these circumstances, and in order that no technical question should arise as to the terms of the notice, our client does not propose to take down the sign until Jan. 31, 1940 ; and we should be glad, therefore, if you would accept this letter as notice under cl. 4 of the lease, that in view of the lighting regulations which forbid our client to light up the neon sign, he hereby gives your clients one month's notice terminating the lease, such notice to expire at the end of Jan., 1940.

There is no question that that would be a proper notice if the defendant had the power in the circumstances to determine the agreement. The sole question is as to the true construction of this clause, which gives the defendant the right to give a notice terminating the agreement. The clause in effect provided that if any authority lawfully empowered to do so shall require the sign to be altered or amended then the lessee shall have the right to determine this lease. Has anyone required the sign to be "altered or amended"? So far as the order goes, it is simply a prohibition of the lighting up of the sign. That by itself is not an alteration in the sign, although it is an alteration in the method of using the sign. I am afraid the words are quite plain, although one feels a certain amount of sympathy with the defendant because he is unable, in the circumstances, to determine the agreement, and has to continue with it, although he does not get the full benefit of it. Nevertheless, so far as I read the agreement and the order referred to, it is impossible to say that the defendant has been required to alter or amend the sign.

In these circumstances, I think that the county court judge was right in saying that there was no defence to the claim made by the plaintiffs for the sum of £11 5*s.* for rent, as the notice to determine the agreement was ineffective, because it was outside the terms of the proviso on its true construction. For these reasons, I think that the judgment of the county court judge was right, and that this appeal must be dismissed.

GODDARD, L.J.: I agree. I share the feeling of sympathy of LUXMOORE, L.J., with the defendant, and it is a case in which one would have thought that, in the circumstances, some concession would have been made. The point is to some extent a fine one. If the lighting order had required illuminated signs to be so treated as to be incapable of illumination, there is no doubt that it would come within the expression "alter or amend." The result would have been that the defendant would have been required to alter or amend the sign, and would have been entitled to give the notice. However, that is not what has happened. All that the order has forbidden him to do is to illuminate the sign. In other words, the regulation deals with the use of the sign, and not with its construction. In those circumstances, I feel it impossible to say that the parties have provided for what has happened, and, in the circumstances, if the plaintiff is minded to demand his full rent, he must have it.

MORTON, J.: I agree that the appeal must be dismissed, and I also agree with the observations of GODDARD, L.J.

Appeal dismissed with costs.

Solicitors: *Gibson & Weldon*, agents for *Edgar Mercer & Co.*, Liverpool (for the appellant); *Jaques & Co.*, agents for *T. J. Smith & Son*, Liverpool (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Applied. *Re* A SOLICITOR (1951 M. No. 234). [1952] 1 All E.R. 133.

Re HENDERSON, HENDERSON *v.* HENDERSON.

[CHANCERY DIVISION (Bennett, J.), **June 14, 1940.**]

Trusts and Trustees—Appointment of new trustee—By court—Former trustee wishing to continue in office—Friction between trustees—Appointment of Public Trustee—Jurisdiction—Trustee Act, 1925 (*c.* 19), *s.* 41 (1).

The applicant and the respondent were the trustees of a will, the respondent being also the tenant for life of the residuary estate and the applicant entitled in reversion thereon. Friction having arisen between these trustees, it was arranged that the Public Trustee should be appointed a trustee in place of the respondent. Later, the respondent said that, at the time when this arrangement was made, she thought that its effect would be that the trusts would be independently administered by the Public Trustee, and she refused to concur in the appointment of the Public Trustee. Thereupon, the applicant made this application under the Trustee Act, 1925, s. 41 (1), asking that the Public Trustee might be appointed in place of the respondent :—

HELD : in the circumstances, it was expedient to appoint a new trustee of the will, and the Public Trustee should be appointed a trustee in place of the respondent.

[**EDITORIAL NOTE.** It is not the practice of the court to displace a trustee who desires to continue to act in the trust, unless he or she has been guilty of some breach of trust. At the same time, it is difficult for the trust to be properly administered if there is continual friction between the trustees. The present decision might be viewed as some little relaxation of the reluctance of the court to displace a trustee, and is of the more importance since the imposition of statutory trusts under recent legislation.

AS TO APPOINTMENT OF TRUSTEES BY THE COURT, see HALSBURY, Hailsham Edn., Vol. 33, pp. 179-181, paras. 313-317 ; and FOR CASES, see DIGEST, Vol. 43, pp. 683-686, Nos. 1126-1184.]

Case referred to :

(1) *Re Combs* (1884), 51 L.T. 45 ; 43 Digest 755, *1980*.

ADJOURNED SUMMONS asking that pursuant to the Trustee Act, 1925, s. 41, the Public Trustee might be appointed a trustee of the will and codicil of the testator in the place of Lulu Cozad Henderson and to act jointly with the applicant.

Roger W. Turnbull for the applicant.

M. J. L. Beebee for the respondent.

Beebee : There is no reason why parties who had agreed to an order should not change their minds by consent. The respondent found the Public Trustee would continue to employ the applicant's solicitors, and she is not satisfied as to the safety of the trust. The applicant will not agree to the Public Trustee acting as sole trustee. What the applicant demands amounts to specific performance of this order, and for that there is no consideration, and therefore it ought not to be granted.

Turnbull : There is ample consideration for this agreement before SIMONDS, J., in the mutual promises of the parties.

BENNETT, J. : This is a somewhat unusual application by originating summons by one of two trustees of the will of Charles Alfred Henderson against her co-trustee, asking for an order pursuant to the Trustee Act, 1925, s. 41, that the Public Trustee be appointed executor and trustee of the will and codicil of Charles Alfred Henderson in place of the respondent to act jointly with the applicant. The facts which give rise to this application are unusual. The testator died on Mar. 20, 1932, having made a will on Aug. 26, 1931. By that will, he appointed his widow, the respondent, and his niece, the applicant, to be the executors and trustees. Under the terms of the will, the respondent is tenant for life of the testator's residuary estate, and the applicant is entitled to the residuary estate in reversion. The two persons named as executors proved the will on July 6, 1932, and from that time, so far as I know, down till 1938, when friction between them resulted in the respondent, issuing an originating summons in which she was the plaintiff and the present applicant was the defendant, there was no friction between them. Among the numerous orders for which, on Dec. 16, 1938, the respondent, as the plaintiff in that matter, asked, was one that the Public Trustee should be appointed a new trustee of the testator's will and codicil in place of the plaintiff, who was desirous of retiring, and in support of that she swore an affidavit on Jan. 24, 1939, para. 22 of which was as follows:

> Having regard to the differences which have arisen between the defendant and myself as to the administration of the trust estate, and the conflict of interest arising from the defendant's position as an executor trustee and reversioner, I am desirous of retiring from the trust provided that the Public Trustee be appointed in my place.

The defendant to that summons, the applicant in the present summons, replied to this affidavit. On May 12, 1939, she swore as follows:

> While I should have preferred in view of the size of the estate that a suitable unpaid trustee should have been appointed I am in the circumstances willing that the Public Trustee should be appointed trustee in place of the plaintiff and jointly with myself and am prepared to take any steps necessary for effecting that appointment.

The summons came before SIMONDS, J., on Nov. 24, 1939, and the order shows that certain undertakings were given to the court by the defendant, including an undertaking to concur with the plaintiff in appointing the Public Trustee a trustee of the will in place of the plaintiff to act jointly with the defendant.

After the order was drawn up, the respondent was called upon to concur with the applicant in making the appointment of the Public Trustee as trustee in her place. On Feb. 7, 1940, the respondent's solicitors wrote to the applicant's solicitors as follows:

> As your client is not prepared to agree that our client's retirement as a trustee and the appointment of the Public Trustee and your client as trustees is upon the footing that the administrative work in connection with the trust is carried out in the Public Trustee's office and independent solicitors are employed when occasion arises, our client as we have already informed you is not willing to retire or to appoint the Public Trustee.

As the respondent insisted, the present summons was issued, and in her affidavit, dated Apr. 11, 1940, the respondent seeks to justify her objection as follows:

> The relief sought by me by the summons referred to in para. 5 of the said affidavit in so far as it related to the appointment of the Public Trustee as a new trustee in place of myself was so sought in the mistaken belief that independent administration of the trust would thereby be secured.

On those facts, the question is whether there is jurisdiction to make the order asked for by the summons. The Trustee Act, 1925, s. 41 (1), upon which counsel for the applicant relies, provides as follows:

> The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance

of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a lunatic or a defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

I do not think that it is open to doubt that, on the language of that subsection, the court has jurisdiction to displace the present executor and trustee and to appoint a new trustee in substitution for the trustee so displaced. Take the case of a trustee who is convicted of felony or is a lunatic or a bankrupt. On the language of the section, in my judgment the court has a discretion which it can exercise if it considers it expedient so to do in appointing a new trustee in place of a trustee who is a felon or a lunatic or a bankrupt, and that part of the subsection which refers to a trustee who is a felon, a lunatic or a bankrupt is expressly stated to be without prejudice to the generality of the language of the foregoing provision. Speaking for myself, I do not doubt that the section gives jurisdiction in a proper case to appoint a new trustee against the will of an existing trustee. Before exercising this jurisdiction, the court must be satisfied that it is expedient to do so. I must not lose sight of the language of COTTON, L.J., in *Re Combs* (1). In that case, there was a dispute as to fact, and, wherever there is a dispute as to fact, the court will not consider it expedient to displace a trustee against his will. In this case, however, where there is no dispute as to fact, the court is entitled to make an appointment of a new trustee. In the present case, having regard to the order for which the respondent asked in her summons, dated Dec. 16, 1938, and having regard to the terms of her affidavit in support of that summons, to the order for which the respondent then asked, and to the order made by SIMONDS, J., I have come to the conclusion that it is expedient to exercise this jurisdiction. The grounds upon which the respondent has changed her mind seem to me to be without any substance. The only ground seems to be that there would not be independent administration by the Public Trustee unless he were the sole trustee, or unless some undertaking were given with regard to the solicitors employed. I cannot bring myself to believe that, if the Public Trustee is appointed, there will not be independent administration. There must be an appointment of the Public Trustee in substitution for the respondent.

Solicitors: *Baileys, Shaw & Gillett* (for the applicant); *C. R. Enever & Co.* (for the respondent).

[*Reported by* I. G. R. MOSES, *Barrister-at-Law.*]

LEWIS *v.* DENYÉ.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Romer and Lord Porter), **May 22, 23, 27, 28, June 27, 1940.]**

Factories—Dangerous machinery—Failure to fence—Contributory negligence—Failure of boy to use push-stick in accordance with statutory regulations—Factory and Workshop Act, 1901 (c. 22), *ss.* 10, 79—*Woodworking Machinery Regulations,* 1922 (*S.R. & O.*, 1922, *No.* 1196), *regs.* 11, 23 (*ii*).

The plaintiff, who was 16½ years of age, met with an accident while employed on a circular wood-cutting machine in the defendant's factory, where he had been so employed, on and off, for some 17 months. At the time of the accident, he was engaged in cutting timber measuring from 3 ins. to 2 ins. in depth, and, before he commenced work, the foreman, in accordance with the practice at the factory, adjusted the guard fitted to the saw in the proper position for cutting timber this size, so that the teeth of the saw were covered by the guard, except at the point where the lengths of timber were inserted, where the teeth were of necessity exposed for a few inches. The plaintiff was supplied with a push-stick for the purpose of pushing through the length of sized timber, and also for that of detaching the off-cut from the left-hand side of the saw. After inserting a piece of timber, and while detaching the off-cut, the thumb of the plaintiff's left hand got caught at the saw at the point of entrance, with the result that his thumb was cut off at the top joint, and that he eventually lost his little finger and the tops of his ring and middle fingers. It was found that the accident was caused through the plaintiff detaching the off-cut with his left hand instead of using the push-stick. The Factory and Workshop Act, 1901, s. 10, provides that all dangerous parts of machinery shall either be securely fenced or be in such a position as to be equally safe to every person working in the factory as they would be if they were securely fenced. The Woodworking Machinery Regulations, 1922, r. 11, made under sect. 79 of the Act, requires a suitable push-stick to be kept available for use at the bench of every circular saw fed by hand, and reg. 23 (*ii*) requires every person employed at the machine to use the push-stick provided in compliance with reg. 11:—

HELD: whether or not the defendant had fully discharged his obligation to fence the saw under the Factory and Workshop Act, 1901, s. 10, the fact that the plaintiff's own negligence caused or contributed to his injury was sufficient to exonerate the defendant in this action.

Decision of Court of Appeal ([1939] 1 All E.R. 310) *affirmed.*

[**EDITORIAL NOTE.** The House of Lords have taken the same view of the facts as TUCKER, J., and the Court of Appeal—namely, that the workman's own negligence was the real and effective cause of the accident. On this view, therefore, it was unnecessary to pronounce upon the correctness of the finding of TUCKER, J., that the employer had committed a breach of the statutory duty securely to fence dangerous machinery. Their Lordships reserve the question whether, in the case of a machine which cannot be made absolutely safe by fencing, the statutory duty amounts to a prohibition of the use of that machine. The question of contributory negligence as a defence to an action of this type was also discussed in the lower courts, but that question was decided in the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (2), and the only point of interest on this point is that LORD ATKIN expresses doubt as to whether the workman had been guilty of such contributory negligence as came within the qualifications placed upon the workman's duty as defined in that case.

AS TO CONTRIBUTORY NEGLIGENCE IN REFERENCE TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, p. 668, para. 1269; and FOR CASES, see DIGEST, Vol. 24, p. 911, Nos. 79-81.]

Cases referred to :

(1) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463.

(2) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152 ; [1939] 3 All E.R. 722 ; Digest Supp.

(3) *Bourke* v. *Butterfield & Lewis, Ltd.* (1927), 38 C.L.R. 354 ; Digest Supp.

(4) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132 ; Digest Supp. ; 103 L.J.K.B. 465 ; 151 L.T. 87 ; *on appeal*, [1936] A.C. 206.

(5) *Davies* v. *Owen (Thomas) & Co.*, [1919] 2 K.B. 39 ; 24 Digest 908, *68* ; 88 L.J.K.B. 887 ; 121 L.T. 156.

Appeal from an order of the Court of Appeal (Slesser, Clauson and du Parcq, L.JJ.), dated Jan. 27, 1939, and reported [1939] 1 All E.R. 310, affirming a decision of Tucker, J., dated Apr. 14, 1938, and reported [1938] 2 All E.R. 813. The facts and the arguments are fully set out in the opinion of Viscount Simon, L.C.

E. G. Hemmerde, K.C., *A. D. Pappworth* and *Miss E. A. MacDonald* for the appellant.

Hartley Shawcross, K.C., and *G. Glynn Blackledge* for the respondent.

Viscount Simon, L.C. : My Lords, this is an appeal from an order of the Court of Appeal, dated Jan. 27, 1939, affirming a judgment in favour of the respondent given by Tucker, J., at Liverpool Assizes on Apr. 14, 1938. The action was brought by the appellant, Leonard Lewis, an infant suing by his father, and next friend, George Lewis, against the respondent Denyé, an occupier of a wood-working factory situated at Birkenhead, for damages for breach of statutory duty whereby the appellant's left hand was seriously injured through coming into contact with the teeth of a power-driven circular saw which he was using at the time. The claim was alternatively put as a claim for damages for negligence arising from failure to fence the saw adequately, but this House has decided in *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (1) that a breach of statutory duty imposed as a protection to workmen against injury is, for the purposes of an action for damages, equivalent to negligence, so that this alternative way of stating the claim need not be separately considered. The respondent denied any negligence or breach of statutory duty, and pleaded that in any case the appellant's injuries were caused, or, in the alternative, were contributed to, by the appellant's own negligence or breach of statutory duty.

The appellant, at the time of the accident in June, 1937, was between 16 and 17 years of age. He had been working at the respondent's factory at various wood-cutting machines for about 18 months, and he had often used the particular machine which injured him. It was a vertical saw set in a bench table, so that only about a quarter of the disc of the saw projected above the level of the bench. The appellant was occupied in reducing to 2 ins. the width of a large number of pieces of wood, which were about 2 ft. long and which varied from 2 ins. to 3 ins. in depth. There are indications in the evidence that the width of the

pieces before they were sawn was about 4 ins. to 5 ins. The method of working was for the appellant to stand facing the front of the revolving saw and to push each length of wood in turn, by means of a push-stick applied at the end of the length, along the bench table until it was engaged by the saw's descending teeth, and then until it was sawn
A through from end to end, so as to produce a piece of the prescribed width on the right, and an off-cut on the left, of the saw. The workman secured the prescribed dimension width of 2 ins. by pressing the wood, as it approached the saw, with his left hand against a perpendicular slab called a guide-fence, which was adjusted in a plane parallel to the
B plane of the saw and at a distance of 2 ins. to the right of it, as the workman was standing. It was, therefore, a necessary part of the operation that the workman should use his left hand to keep the piece of wood pressed against the guide-fence, at any rate until the teeth of the saw had bitten into the wood. At the far side of the saw, and in a direct
C line with it, there was fixed a wedge-shaped riving knife, with its front edge close to the ascending teeth of the saw, which served the purpose of splitting or separating the two severed pieces of wood more completely as they left the saw.

A great deal of confusion arose at the trial because the appellant's
D case was, until a late stage, presented as that of an injury caused to the thumb and fingers of his left hand, owing to their being caught in the teeth of the saw at the riving-knife end. The trial judge, who described the appellant's manner of giving evidence as most unconvincing, came to the conclusion that the accident happened at the point of entrance—
E namely, at the place where the wood is fed into the saw—and not at the further side, where the severed wood leaves the saw and encounters the riving knife. The Court of Appeal took the same view, and there can be no doubt that the finding of TUCKER, J., on this point is correct. The saw was whizzing round at a great pace, the appellant was per-
F forming a repetitive operation which occupied only a few seconds, and which he had carried through again and again, the accident was sudden, unexpected and very painful, and it is not perhaps surprising that this youth did not reconstruct the incident correctly.

The revolving saw was admittedly "dangerous machinery" within
G the meaning of the Factory and Workshop Act, 1901, s. 10 (1) (c), and, therefore, by the terms of that section, required to be "securely fenced." If it was not, the factory, by sect. 10 (2), would be "deemed not to be kept in conformity with this Act," and the occupier would be liable to legal proceedings under sect. 135. Moreover, under sect. 79 of the Act,
H which is one of the bundle of sections dealing with regulations for dangerous trades, the Home Secretary has certified that woodworking machinery is dangerous, and has exercised his power to "make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case." The Woodworking Machinery Regulations, 1922, contain, in reg. 10 (c), detailed requirements for the

fending of a circular saw by means of an adjustable guard, with a flange at the side of the saw farthest from the fence. Reg. 10 continues as follows:

> . . . The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw. A

In the case of a circular saw which is fed by hand (and this was the species of saw in the present case), reg. 11 provides as follows:

> A suitable push-stick shall be kept available for use at the bench of every circular saw which is fed by hand, to enable the work to be carried on without unnecessary risk.

B

Other regulations upon which the appellant relied provided for the training and instruction of any workman to be employed at a wood-working machine, and for the arrangement of the riving knife in relation to the teeth of the saw. Neither TUCKER, J., nor the members of the Court of Appeal regarded these matters as material to the issue, and I need not further refer to them. C

The Woodworking Machinery Regulations, 1922, also contained, under the part headed "Duties of persons employed," a regulation, in reg. 23, requiring every person employed on a wood-working machine to: D

> . . . (i) use and maintain in proper adjustment the guards provided in accordance with these regulations; (ii) use the . . . push-sticks . . . provided in compliance with reg. 11 . . . except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable.

The exception has no application to the present case. The primary purpose of the push-stick, as its name implies, is to push the piece of wood E which is about to be cut into and through the teeth of the saw. A push-stick is required for a circular saw which is "fed by hand" because otherwise the hand of the workman, with the workman's weight behind it, would have to advance right up to the teeth of the saw before the wood was completely cut. However, as I have already pointed out, the work- F man's left hand is needed to keep the piece of wood, as it approaches the teeth of the saw, hard up against the guide-fence. Once the saw has got through the wood, the off-cut on the left of the saw has to be moved away in order not to encumber the bench table for the succeeding operation. The appellant in his evidence at the trial admitted that the G push-stick, which is throughout held in the right hand, should also be used for knocking the off-cut away as it is severed from the main piece by the saw, and he asserted that this is what he did. His case was that, after doing this, he picked up the off-cut, which was then lying loose on the bench table, and, in grasping it, got his left hand caught at the H riving-knife end of the apparatus, because, as he alleged, the fencing was not adequate, or was not properly adjusted. The judge, after a full consideration of all the evidence, rejected this version, and declared himself convinced that [pp. 815, 816]

> . . . though he may have been using the push-stick to push through the sized

> timber pieces, he used his left hand near the point of entrance to detach the off-cut, a proceeding which, though highly dangerous, is none the less easy to perform if carefully done . . . the accident happened at the point of entrance, through failure to use the push-stick, and not as described by the infant plaintiff.

I have read the transcript of the evidence more than once. There was ample material upon which the judge could base his decision as to the facts, and I agree with his conclusion. This conclusion was accepted by the Court of Appeal, and, though this House is at liberty to re-examine the facts, I apprehend that on such a matter as this, where so much depends on testimony as to technical details which cannot be adequately reviewed in the absence of witnesses, your Lordships would be slow to disturb such a finding unless it were unsupported by evidence, more particularly in a case such as this, where witnesses demonstrated by the use of a model how they said or inferred that the accident had happened, and where the record of their evidence furnished to this House makes the real effect of some of the demonstration impossible to follow. I venture to add that those engaged at a trial in extracting the testimony of witnesses with the help of a model would do well to remember that the demonstratives "this" or "that" or "here" or "there," while illuminating the understanding when the eye can follow a moving finger or a wave of the hand, may convey no information whatever when the gaze of an appellate tribunal is necessarily restricted to the still-life of a shorthand note. On the issue whether or not the appellant established against the respondent any breach of statutory duty, the trial judge reached the conclusion that the respondent had carried out all the requirements of the regulations incumbent upon him, so far as these were relevant to the accident, but TUCKER, J., went on to hold that, nevertheless, sect. 10 was not complied with, inasmuch as, by reason of the exposed teeth of the saw at the point of entrance, the machine could not be said to have been "securely fenced."

My Lords, in the view which I take of this case, it is not necessary to pronounce upon the correctness of either of these conclusions, for I have reached the view that it was not any breach of duty by the respondent, but the appellant's own negligent proceeding, described by the trial judge as "highly dangerous," which was the "real and effective cause of the accident." This is the unanimous view of the Court of Appeal. TUCKER, J., put the matter somewhat differently (though he reached the same result), for he based the conclusion that the appellant could not succeed upon his breach of the statutory duty laid upon him by the Woodworking Machinery, Use of, Regulations, 1922, to observe reg. 23. I am not satisfied that a breach of regulations for dangerous trades imposing duties on the workman in all cases automatically furnishes a defence to the employer whom he sues for damages for breach of statutory duties imposed on the employer. The workmen's breach may, however, be such as to provide evidence of his negligence, and here, apart altogether from reg. 23, negligence of the appellant which caused the accident was, in my opinion, made out. Such negligence will not, indeed, be conclusive of the case if the obligation to keep dangerous machinery "securely fenced," which is imposed upon the occupier by sect. 10, permits the injured workman to hold his employer liable even though his injury is caused, or contributed to, by his own negligence. This question, however, was recently considered in your Lordships' House in reference to a similarly phrased section of the Coal Mines Act, A 1911, in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (2). The decision of this House in *Caswell's* case (2) was pronounced after the judgments of the Court of Appeal in the present case, and confirms the view which was really assumed in the judgments in the present case in the courts below—namely, that negligence in the workman causing or B contributing to the accident is a defence in an action alleging that the occupier did not fence securely. If the decision of the High Court of Australia in *Bourke* v. *Butterfield & Lewis, Ltd.* (3) is to be regarded as going so far as to lay down that, in an action for damages for breach of the statutory duty to furnish protection against dangerous machinery, C no amount of negligence on the part of the plaintiff workman can ever provide a defence, this House in *Caswell's* case (2) indicated that it could not accept so absolute and far-reaching a rule when construing the Coal Mines Act, 1911, s. 55. I quote the following passage on the point from the opinion of my noble and learned friend LORD ATKIN, at pp. 164, 165 D ([1939] 3 All E.R., at pp. 729, 730):

> The argument is that safety obligations are placed upon employers for the purpose of protecting not only workmen who are careful but also those who are careless, and that the object of the legislature is defeated if the right to sue for injuries caused by the breach of the safety regulations is denied to the careless workman for whose benefit, amongst others, the legislation was specially enacted. I venture E to think that this attractive theory does not give sufficient weight to the true cause of action in such cases. The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission F but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage G there would be no defence.

In that case, LORD ATKIN, and also LORD WRIGHT, expressed approval of the statement of the law made by LAWRENCE, J., in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (4), at p. 140:

> I think, of course, that in considering whether an ordinary prudent workman H would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

I entirely accept these conclusions as applying to the construction of the Factory and Workshop Act, 1901, s. 10. Under that Act, as under the Coal Mines Act, 1911, s. 55, I agree that too high a standard of care must not be demanded from a workman. The action of the appellant, however, in using his left hand near the point where the almost severed wood reached the teeth of the saw to detach the off-cut has been found by the judge to be a "highly dangerous proceeding." I agree with this finding. In all the circumstances, it was not such an act as his familiarity with the machine might justify or condone. An act of this quality was at least a substantial cause of the appellant's injury, and, therefore, contributed to it so as to exonerate the respondent from liability.

This disposes of the appeal, but I must add one observation on the construction of sect. 10 in order to make clear what is being decided in the present judgment and what is not. Does sect. 10 impose an obligation to provide such a degree of secure fencing for a dangerous machine as makes the machine no longer dangerous at all to a reasonably careful workman, even though this result could only be attained at the expense of making the use of the machine impracticable, and hence in effect prohibiting its use altogether, or is a dangerous machine to be regarded as "securely fenced" under sect. 10 if the fencing protects the workman from danger so far as that can practicably be done consistently with the machine being used? If the first of these two views were correct, this might amount to a prohibition of the use of circular saws altogether (even saws of the most modern type, such as this one, fitted with the best-known safety devices), and I should be extremely unwilling to make the present case the occasion for a final pronouncement on this issue, which is so important to British industry alike in peace and in war, unless this were necessary for our decision. It is not so necessary, and I desire to reserve my opinion as to the correctness of the view expressed by Salter, J., in *Davies* v. *Owen* (*Thomas*) *& Co.* (5), which would interpret the section thus, at p. 41:

> If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use.

For the purpose of determining the present appeal, it is unnecessary to decide whether or not the respondent had fully discharged his obligation to fence. The conclusion that the appellant's own negligence caused or contributed to his injury is sufficient to exonerate the respondent in this action. I move that the appeal be dismissed. The appellant should have 4 weeks from to-day in which to apply to the county court, if he so desires, for compensation to be assessed under the Workmen's Compensation Act, 1925.

Lord Atkin: My Lords, I doubt whether, unassisted, I should have been able to come to the conclusion that this boy had been guilty of such contributory negligence as came within the qualifications placed upon the workman's duty of care in such circumstances by the decision in this House in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (2), and I should have attached importance to the fact that that case was decided after the judgments were given in the Court of Appeal in the present case. However, all your Lordships and all the judges in the courts below are of opinion that the plaintiff was guilty of contributory negligence, and I suppose that I must be wrong. At any rate, I do not dissent. I only wish to add that, in reserving, as does Viscount Simon, L.C., any decision upon the construction of the Factory and Workshop Act, 1901, s. 10, I do not thereby wish to express any doubt as to the correctness or otherwise of the case to which he refers and the numerous cases following it.

Lord Thankerton: My Lords, I have had the opportunity and privilege of considering the opinion just delivered by my noble and learned friend Viscount Simon, L.C., and I desire to express my entire concurrence with it,

Lord Romer: My Lords, I too have had the privilege of reading and considering the opinion which has been delivered by my noble and learned friend Viscount Simon, L.C. That opinion completely expresses my own views upon this matter, and I agree with the motion which he has proposed.

Lord Porter: My Lords, I also concur.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellant); *W. Stanley Eastburn*, agent for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

NOTE.

BOARLAND *v.* PIRIE APPLETON & CO., LTD.
STEMCO, LTD. *v.* INLAND REVENUE COMMISSIONERS.
STEMCO, LTD. *v.* HYETT.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **July 1, 1940.**]

Appeal by the taxpayers from a judgment of Wrottesley, J., reported [1940] 1 All E.R. 539.

The Court of Appeal dismissed with costs an appeal in this case, Scott, L.J., stating that the court, having read and considered the judgment of Wrottesley, J., concurred with that judgment and with the reasons upon which it was founded, and did not think it necessary to add an independent judgment of its own.

Re LUCK, WALKER *v.* LUCK.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Luxmoore, L.JJ.), **June 21, 1940.**]

A *Conflict of Laws—Illegitimate child—Legitimation according to law of foreign domicil—Law of domicil recognising subsequent legitimation by adoption—Father not domiciled in foreign country at time of child's birth—Father domiciled in foreign country at time of child's legitimation—Public policy—Legitimacy Act,* 1926 (*c.* 60), *ss.* 1, 8.

B Under a marriage settlement dated Apr. 24, 1867, to which the testator was a party, and by a will dated Dec. 20, 1887, respectively, two funds of property were left, *inter alia*, and as far as is material, on trust for the issue of the testator living at the time of his death or born within 21 years thereafter. His wife having predeceased him in 1892, the testator died in 1896. Both the marriage settlement and the will had been executed in England. Among other children, the testator left a son him surviving. The son married in 1893, and there were two children of that marriage, the second and the third defendants. Some years after his marriage, the testator's son left his wife and proceeded from C England to the United States of America. In the State of California, he formed a connection with a woman while his marriage was still subsisting, and of that illicit union the first defendant was born in 1906. It was found as a fact that the first defendant's father was not at that time domiciled in the State of California. In 1922, the wife obtained a divorce from him, and thereafter, in 1925, he married a D woman not the mother of the first defendant. At that time, he was domiciled in the State of California, and shortly after the marriage he adopted the first defendant. It was proved that the law of California requires for the legitimation of a child that the latter shall be adopted and received into the home of the parent. This was not, therefore, a case of legitimation by subsequent marriage. The first defendant's father having died in 1938, the first defendant now claimed to be entitled E to his share in the funds of the marriage settlement and the testator's residuary estate respectively. On behalf of the second and third defendants, the legitimate children of the first defendant's father, it was contended that, as both the marriage settlement and the will had been executed in England, they had to be construed according to English law, and that, on the authority of *Udny* v. *Udny* (2), the first defendant was barred from taking any benefit, owing to the fact that his father, F although domiciled in California at the time of the first defendant's adoption, had not been so domiciled at the time of his birth. It was also contended that to recognise the first defendant as a legitimate child would be contrary to public policy.

HELD (SCOTT, L.J., *dissenting*): if by the law of the father's domicil, the relationship is immutably that of putative father and illegitimate G child, nothing can thereafter change it. The domicil of the father in this case being English at the date of the child's birth, English courts would not recognise the jurisdiction of a foreign legislature to impose upon him the status of paternity which he did not acquire at the child's birth. The first defendant was therefore illegitimate according to English law, and so disentitled to a share in the funds of the marriage settlement and the testator's residuary estate.

H *Decision of* FARWELL, J. ([1940] 1 All E.R. 375) *reversed.*

[**EDITORIAL NOTE.** The law of California is peculiar in its provisions relating to the legitimation of children. Generally speaking, legitimation is effected by the subsequent marriage of the parents, although in many cases certain other conditions must also be fulfilled. The present case is not concerned with legitimation by subsequent marriage, but it is held that the principles laid down by the authorities in the case of this method of legitimation are not limited to this method only, but will cover such a case as the present one. The result is that, notwithstanding that the act of adoption in California made the first defendant legitimate as from his birth, the English courts do not recognise this legitimation, since, at the time of the child's birth, the father had an English domicil.

AS TO LEGITIMATION, see HALSBURY, Hailsham Edn., Vol. 6, pp. 315, 316,
para. 367; and FOR CASES, see DIGEST, Vol. 3, pp. 372-375, Nos. 131-153.] A

Cases referred to:

(1) *Re Wright's Trust* (1856), 2 K. & J. 595; 3 Digest 372, *134*; 25 L.J.Ch. 621; 27 L.T.O.S. 213.

(2) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441; 3 Digest 372, *132*.

(3) *Re Grove, Vaucher* v. *Treasury Solicitor* (1888), 40 Ch.D. 216; 3 Digest 372, B
136; 58 L.J.Ch. 57; 59 L.T. 587.

(4) *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842; 3 Digest 373, *138*.

(5) *Shedden and Shedden* v. *A.-G. and Patrick and Patrick* (1860), 2 Sw. & Tr. 170; 3 Digest 370, *114*; 30 L.J.P.M. & A. 217; 3 L.T. 592; *affd. sub nom. Shedden* v. *Patrick and A.-G.* (1869), L.R. 1 Sc. & Div. 470.

(6) *Birtwhistle* v. *Vardill* (1840), 7 Cl. & Fin. 895; 3 Digest 374, *144*; *previous* C
proceedings, sub nom. Doe d. Birtwhistle v. *Vardill* (1835), 2 Cl. & Fin. 571.

(7) *Re Goodman's Trusts* (1881), 17 Ch.D. 266; 3 Digest 372, *135*; 50 L.J.Ch. 425; 44 L.T. 527.

(8) *Re Annesley, Davidson* v. *Annesley*, [1926] Ch. 692; Digest Supp.; 95 L.J.Ch.
404; 135 L.T. 508. D

(9) *Re Askew, Marjoribanks* v. *Askew*, [1930] 2 Ch. 259; Digest Supp.; 99 L.J.Ch. 466; 143 L.T. 616.

(10) *Salvesen (or von Lorang)* v. *Austrian Property Administrator*, [1927] A.C. 641; Digest Supp.; 96 L.J.P.C. 105; 137 L.T. 571.

(11) *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; 11 Digest 428, *929*; 37 L.J.Ch.
433; 18 L.T. 833. E

(12) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 11 Digest 422, *885*; 64 L.J.P.C. 97; 72 L.T. 873.

(13) *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; 11 Digest 333, *221*; 89 L.J.P.C. 209; 124 L.T. 129.

(14) *Hobbs* v. *Henning* (1865), 17 C.B.N.S. 791; 11 Digest 465, *1208*; 34 L.J.C.P.
117; 12 L.T. 205. F

(15) *Re Ullee (Infants of Nawab Nazim of Bengal)* (1885), 54 L.T. 286; 11 Digest 442, *1016*; *on appeal from* (1884), 53 L.T. 712.

(16) *Skottowe* v. *Young* (1871), L.R. 11 Eq. 474; 3 Digest 375, *152*; 40 L.J.Ch. 366; 24 L.T. 220.

(17) *Monro* v. *Ross* (1830), 4 Wils. & S. 289.

(18) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488; 11 Digest 333, *218*. G

(19) *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54; 22 Digest 625, *6896*; *on appeal* (1814), 2 Hag. Con. 137, n.

(20) *Dalhousie (Countess)* v. *M'Douall* (1840), 7 Cl. & Fin. 817; 3 Digest 373, *139*.

(21) *Sottomayer* v. *De Barros* (1879), 5 P.D. 94; 11 Digest 416, *829*; 49 L.J.P. 1; 41 L.T. 281.

(22) *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; 11 Digest 429, *932*; 52 L.J.P. H
33; 48 L.T. 273; *on appeal from* (1880), 6 P.D. 35.

(23) *Re B—'s Settlement, B—* v. *B—*, [1940] Ch. 54; Digest Supp.

(24) *Nugent* v. *Vetzera* (1866), L.R. 2 Eq. 704; 11 Digest 443, *1019*; 35 L.J.Ch. 777; 15 L.T. 33.

(25) *Quinn* v. *Leathem*, [1901] A.C. 495; 14 Digest 112, *814*; 70 L.J.P.C. 76; 85 L.T. 289.

(26) *Boyes* v. *Bedale* (1863), 1 Hem. & M. 798; 3 Digest 374, *149*; 33 L.J.Ch. 283; 10 L.T. 131.

APPEAL by the second and third defendants from an order of FARWELL, J., dated Jan. 26, 1940, and reported [1940] 1 All E.R. 375, where the facts are fully set out.

A *J. A. Reid* for the plaintiff.

A. F. Maurice Berkeley for the appellants.

J. Neville Gray, K.C., and *A. J. Belsham* for the respondent.

Berkeley: The point at issue is whether a child legitimated under foreign law can take, as a legitimated child of his father, under a settle-
B ment taking effect under English law. There are numerous cases on the point, but in all instances they relate to legitimation by subsequent marriage. There is no reported case where there has been legitimation by adoption. The cases relating to legitimation by subsequent marriage apply to legitimation by adoption also. English law is applicable to
C this case. The Legitimacy Act, 1926, s. 8, deals with legitimation under foreign law, and it provides for legitimation by subsequent marriage. Sect. 8 makes the date of marriage the relevant date. The respondent claims, however, that at common law the date of birth is the relevant date. The question of legitimacy is one of status, and, by English law,
D questions of status depend upon the law of domicil: *Re Goodman's Trusts* (7). There is no distinction in principle between legitimation by subsequent marriage and legitimation by adoption. In each case it depends upon the act of the father. It cannot be said that on July 1, 1917, David Luck was a legitimate child. It was not possible for the
E settlor to provide that there should be power to appoint to a class which should include children who should be subsequently legitimated. It was not competent for the settlor to dispose of his property in such a way that the interest of David Luck should not arise until 1925. The interest of remaindermen must vest within 21 years of a life in being.
F David Luck was not legitimated within the period. He could not say that his interest vested on July 1, 1917. His subsequent legitimation could not operate to divest interests already created. The construction point arises under the settlement only. If David Luck should be regarded as legitimate by English law, he would then take under the will. He
G cannot take under the settlement, however, by reason of the rule against perpetuities. [Counsel referred to *Re Wright's Trust* (1).]

Gray, K.C.: If the father and mother were both domiciled in California at the date when the respondent was adopted, that is sufficient to make him legitimate for the purposes of English law. Legitimation
H by subsequent marriage is quite different from legitimation by adoption. The effect of adoption is to make the child legitimate from birth. The questions which arise on legitimation by subsequent marriage are absent in the case of legitimation by adoption. English law has no rule in respect of any kind of legitimation other than legitimation by subsequent marriage, that the father must be domiciled in the country where the

child is born at the date of its birth and also domiciled in the country which permits legitimation by subsequent marriage, at the time of the marriage. Unless there is a reason for imposing a limitation, the law will not impose it. There is no authority for saying that the status of a child to be legitimated depends upon the domicil of the putative father, except for the purpose of legitimation by subsequent marriage. The status of the child in respect of all matters except legitimation by subsequent marriage depends upon the child's own domicil, and that domicil is the domicil of the mother. It is only in cases of legitimation by subsequent marriage that it is necessary to show that the father's domicil in the relevant country existed both at the date of the child's birth and at the date of the putative father's subsequent marriage. *Re Wright's Trust* (1) depended upon going to the principles of Roman law, which involve a contract. It is upon that ground that Sir William Page Wood, V.-C., decided that case. The rational, sensible and logical principle to apply when one is not dealing with legitimation by subsequent marriage is to look at what is being done, and, if it is an act of adoption by the father, which is recognised by the law of the country where it takes place, there can be no possible reason for looking for any date other than the date when the act is done. David Luck was a member of the class on July 1, 1917, because he was a life in being, and because the Californian law says that on legitimation a person shall be deemed legitimate from birth. As he was a member of the class on July 1, 1917, he was within the power and within the exercise of it. There have been a number of cases in which the courts in England have recognised legitimacy in cases where English law would not treat the child as legitimate. *Re Askew, Marjoribanks* v. *Askew* (9) is such a case. [Counsel referred to *Munro* v. *Munro* (4), *Birtwhistle* v. *Vardill* (6) and *Udny* v. *Udny* (2).]

Berkeley, in reply.

Luxmoore, L.J. [delivering the judgment of Sir Wilfrid Greene, M.R., and Luxmoore, L.J.]: The respondent, David George Croft Luck (whom we will call David Luck), was born on July 26, 1906, at Whittier, California, in the United States of America. His parents were Frederick Charles Luck and a spinster named Martha Anne Croft, with whom the father was living. The father was at the time the husband of Clare Henrietta Batiste Luck, by whom he had had two children—namely, the defendants Charles Pyne Luck and Eileen Marguerite Krjesinsky Astafiev. On July 19, 1922, the marriage of Frederick Charles Luck was dissolved by a judgment of the Superior Court of the county of Los Angeles in the State of California in which State he was at that time apparently domiciled. On July 27, 1922, Frederick Charles Luck married Alma Hyam, and by a document dated Oct. 23, 1925, and signed by him with her consent, he acknowledged David Luck as his child and adopted him. This document was in point of form sufficient to comply with the Californian Civil Code, sect. 230, which provides that in such cases the child is to be "deemed for all purposes legitimate from the time of its birth." It is not disputed that Frederick Charles Luck was domiciled in the State of California when he executed this document. Frederick Charles Luck died on July 6, 1938. There was no issue of his second marriage.

Frederick Charles Luck was one of the 9 children of Frederick George Luck, the testator, who died on July 1, 1896, by his wife, Fanny Elizabeth Luck, who died on June 14, 1892. He was a British subject, born in England, and his domicil of origin was English. By the marriage settlement of the testator and his wife, certain funds were settled subject to the life interests of the spouses in the following terms:

> . . . in trust for all or such one or more exclusively of the other or others of the issue of the said intended marriage to be born during the lives of the testator and Mrs. Luck or the life of the survivor of them or within 21 years after the death of such survivor [as might be appointed by the spouses jointly by deed or by the survivor of them by deed or will.]

By a deed poll, dated Nov. 12, 1888, the testator and his wife appointed the trust funds equally among all the children of the marriage, but so that each child took only a life interest, and so that the capital of his or her share was to be divided equally among all his or her children who should have been born within 21 years after the decease of the survivor of the testator and his wife. A subsequent partial revocation of this appointment and a new appointment effected by the testator are not material to the present questions.

The testator by his will devised and bequeathed his residuary estate upon trust after the death of his wife for all his children living at his decease who should attain the age of 21, or, in the case of daughters, marry, but the share of each child was settled upon trust for him or her for life, and thereafter in trust for his or her children who should attain the age of 21, or, in the case of daughters, marry. By virtue of accruer clauses the shares of Frederick Charles Luck under the marriage settlement and the will respectively amounted at his death to one-eighth and one-seventh of the respective settled funds, and there is a probability that further shares will accrue in the future.

In these circumstances, David Luck claims to be entitled to share equally with the other two defendants in the settled shares of Frederick Charles Luck in the funds settled by the marriage settlement and the will of the testator, alleging that, although he was born illegitimate, he was legitimated under the law of California, and that this legitimation dates back to the moment of his birth. This claim was upheld by FARWELL, J., from whose decision the present appeal is brought by the two last-named defendants, the children of the first marriage of Frederick Charles Luck.

On behalf of the appellants, two arguments are raised. First, it is said that the English courts will not recognise the purported legitimation, in view of the fact that, at the date of the birth of David Luck, Frederick Charles Luck was, as FARWELL, J., held, still domiciled in England.

Secondly, it is said that, in any event, upon the true construction of the marriage settlement, David Luck is not entitled to a share in the funds thereby settled in view of the fact that he was not legitimated before the expiration of the period of 21 years mentioned in the settlement.

Before dealing with the novel and interesting question of law raised by the first of these two arguments it is necessary to examine the question of fact as to the domicil of Frederick Charles Luck at the date of the birth of David Luck—namely, July 26, 1906. It is conceded by the appellants that, if Frederick Charles Luck was at that date domiciled in the State of California, the instrument of acknowledgment must be regarded in our courts as effective to legitimate David Luck as from his birth. On behalf of the respondent, the finding of Farwell, J., on the question of domicil was attacked, and we were invited to hold that Frederick Charles Luck had already acquired a domicil of choice in California when David Luck was born. The facts bearing upon this question may be summarised thus. Frederick Charles Luck left his first wife at some time in 1904 and went to Antwerp. From there he cabled to Australia to Martha Anne Croft, whom he had previously known in Ceylon, inviting her to join him in Antwerp, which she did, arriving there in Sept., 1904. Thereafter they lived together until Feb., 1918, when they separated for good. After a short time spent in Antwerp, they decided to go to the United States of America. The principal reason for this move was the fear of Frederick Charles Luck that his wife would discover that he was living with Martha Anne Croft, and that, as a result, his financial expectations might be prejudicially affected. Martha Anne Croft sailed first, arriving in New York in March or April, 1905, and she was followed in the summer of 1905 by Frederick Charles Luck. They spent some time in employment in East Aurora, in the State of New York, and went to California in the early part of 1906. They took a lease of a house in Whittier, near Los Angeles, and Frederick Charles Luck purchased this house on Sept. 24, 1907. He sold it in 1912, after he and Martha Anne Croft had left Whittier for Chicago Park in central California, where Frederick Charles Luck bought a house and fruit ranch in 1911. Their subsequent movements need not be stated.

Upon these facts taken by themselves, it is impossible, in our opinion, to draw the inference that Frederick Charles Luck, who arrived in California in the early part of 1906, had by July 26, 1906, acquired a domicil of choice in California. However, the respondent relies on certain direct evidence of the intention of Frederick Charles Luck at the relevant time. This evidence, however, so far from showing that Frederick Charles Luck had formed the intention necessary to effect a change of domicil by July 26, 1906, appears to us to lead to the opposite inference. First in importance is the affidavit of Martha Anne Croft herself, filed on Oct. 9, 1939. In para. 2 of that affidavit, she states the reasons which Frederick Charles Luck gave her for wanting to go to

California. One was that a man with whom he had become acquainted on the ship had told him a great deal about California, from which he

> . . . had come to believe that California would be a fine place in which to live, particularly because of the ideal climate there.

The other was that his wife

> . . . could not pop in unexpectedly if he were there where we would be so far from England.

In our judgment, it is impossible to infer from this that, when he went to California, he had made up his mind, like an emigrant, to settle there, or that his experience of California, obtained during the few months intervening between his arrival and the birth of David Luck, was sufficient to form in his mind the intention of remaining there indefinitely. The true inference, in our opinion, is that he went to California as an experiment, and that it was only later that he formed the necessary intention of making his home there.

The next affidavit is that of Douglas R. Radford, filed on Oct. 9, 1939. This deponent knew Frederick Charles Luck at Whittier. In para. 3 of his affidavit, he said that he first met him in the spring of 1906, which would have been shortly after his arrival. In the same paragraph, he says that their first meeting was a few months after the birth of David Luck, but from para. 4 and para. 5 it seems that the word "after" is a slip for "before." In para. 5, the deponent says that, in conversations during the early part of their acquaintance, both before and after the birth of David Luck, Frederick Charles Luck on several occasions stated that

> . . . he had come to California for the purpose of establishing his home here, that he preferred California to England as a place in which to live and that he never intended to return to England.

This is the highwatermark of the evidence, but, in our opinion, it is insufficient to justify an inference that a change of domicil took place as soon as is alleged, particularly in view of the state of mind in which, according to Martha Anne Croft, Frederick Charles Luck first went to California. This view is confirmed by certain other facts which are in evidence. It appears that Frederick Charles Luck from time to time visited the State of Arizona. He spent a month there in the spring of 1907, giving to Martha Anne Croft as his reason the fact that his wife was threatening to come to California, and he wanted to let her think that he was living in Arizona. In 1909, he again went to Arizona, and stayed there for about a year. This visit, according to Martha Anne Croft, was primarily for a vacation and pleasure, and secondarily with a view to exploring the possibilities of purchasing land there. However, more light is thrown on these visits to Arizona by certain other matters. In a letter written from Whittier by Frederick Charles Luck to his wife and dated Mar. 1, he refers to a scheme for starting a tourist camp and Indian trading-station in Arizona, and to a further project for a sanatorium. This scheme had been under consideration in 1907, and he had sunk a certain amount of money in it. He says that he does not want anything to interfere with the Arizona prospect, and adds:

> . . . in any case I do not intend to stay in Southern California longer than I can possibly help.

Two more letters in May and August are written to his wife from an address in Arizona, and there is a letter written to his daughter in June, 1910, from the same address. In addition to these letters, there is the fact, upon which Farwell, J., particularly relied, that he and his wife executed an agreement under seal, dated Apr. 19, 1907, whereby he agreed to make her an allowance. In this deed, he is described as

> . . . formerly of The Olives, Wadhurst, Sussex, England, and now of Pinedale, Snowflake, Arizona, U.S.A.

Also, it is recited in the deed that he is

> . . . engaged in business in the United States and will necessarily be resident out of England for some years.

We were invited to take the view that the visits to Arizona, the references to his projects there, his intention to leave California and the statements in the agreement all owed their origin to a desire to deceive his wife as to his whereabouts, and that they must be disregarded. We cannot accept this suggestion. These matters we regard as reliable evidence in support of the view that—at any rate during 1907, and as late as Mar., 1908—Frederick Charles Luck had not made up his mind to remain indefinitely in California.

Reference was also made to an affidavit of Frederick Charles Luck's second wife, Mrs. Alma Hyam Luck, who met Frederick Charles Luck for the first time in the late summer or early autumn of 1907. She says that very early in their acquaintance:

> . . . probably in the fall of 1907, and on subsequent occasions, Frederick Charles Luck told me in substance that he had come to California because he believed it was a good place to which to live . . . that he expected to remain in California, that he did not care to live in England and had no intention of returning to that country.

This evidence certainly does not show that firm intention which is required for the acquisition of a domicil of choice.

We now turn to a consideration of the effect of the instrument of adoption. So far as this is a matter for the law of California, the finding of fact of Farwell, J., which is not disputed, is as follows ([1940] 1 All E.R., at p. 379):

> The effect was that this defendant became, according to the law of California, the legitimate son of his father. Not only that, the effect of the law was that he became the legitimate son of his father from the date of his birth.

Later, Farwell, J., held that, as David Luck was domiciled in California on Oct. 23, 1925, which was the date of the act of adoption, his status was governed by the law of California, and that, accordingly, an act which by that law had the effect of changing that status must be regarded in the courts of this country as producing that effect for the purpose in hand. He held that the domicil of Frederick Charles Luck at the date of David Luck's birth and the fact that, by the law of that domicil, the status of David Luck was fixed at his birth as illegitimate were not relevant considerations, as they admittedly would have been if legitimation had been effected, not by adoption, but by a subsequent marriage of Frederick Charles Luck to Martha Anne Croft. He stated that he was unable to appreciate the reasons why, in the case of legitimation *per subsequens matrimonium*, the existence at the date of birth of a potentiality of such legitimation according to the law of the country in which the father is domiciled at the time has been held to be necessary, and he declined to regard the authorities in which the law was so laid down as binding on him to apply a similar principle to the facts of the present case.

Two preliminary observations may be made with regard to this decision of the judge. In the first place, he assumes that the domicil of David Luck on Oct. 23, 1925, was Californian. As David was illegitimate, his domicil followed that of his mother, Martha Anne Croft. The evidence was not directed to the question of her domicil, which was not necessarily the same as that of Frederick Charles Luck. We do not even know what was her domicil of origin. Moreover, apart from the facts of her association with Frederick Charles Luck, we have no material upon which to base an inference as to her intentions. However, for present purposes, we will assume that on Oct. 23, 1925, Martha Anne Croft and, consequently, David Luck, were domiciled in California. The other observation is this. Even if the view of the judge that the only matter to be considered is the domicil of David Luck at the date of the adoption is right, it does not appear to us necessarily to follow that the courts of this country will give effect to the law of California in so far as it relates back to David Luck's birth. Let it be assumed, for the sake of argument, that, during such time as a person is domiciled in a given country, a change in his status effected by the law of that country will be regarded as effective in the English courts. Let it also be assumed, as we conceive the law to be, that no provision of the law of a foreign country will be regarded in the English courts as effective to change the status of a person not domiciled in that country at the time, except, perhaps, in the case where the law of the country in which such person is domiciled would itself recognise the effectiveness of the foreign law in question. In the present case, the law of California has been held by FARWELL, J., to have had the effect of imposing a particular status upon David Luck during a period when that law was not competent to affect his status in any way. From the date of his birth down to the time, which is not ascertained, when Martha Anne Croft acquired a Californian domicil, the status of David Luck was governed entirely, in the view of FARWELL, J., by the law of the domicil of Martha Anne Croft, which we assume to have been English. By that law, David Luck was, on any view, throughout that period illegitimate. Will the English courts recognise the power of Californian law retrospectively to affect the status of a person in respect of a period when that status was subject to the law of England and to none other? Having regard to the view which we take on the broader issue, and to the fact that this particular point was not argued before us, we do not think it necessary or desirable to express a concluded opinion upon it. Its practical importance would have lain in the fact that, if the competence of the law of California were confined to the period when David Luck was in fact domiciled in California, it would have been necessary to inquire whether or not he had acquired a Californian domicil before the expiration of the period of 21 years mentioned in the marriage settlement—namely, July 1, 1917.

Apart from the principles of private international law, which form part of the law of England, that law did not recognise legitimation of a child born illegitimate until the passing of the Legitimacy Act, 1926. In this respect the law of England differed from the civil and the canon law, from the law of Scotland, and from that of many continental countries, all of which recognised one particular form—and, so far as we know, one form only—of legitimation—namely, legitimation by subsequent marriage of the parents. Under the law of France, and, possibly, under that of other countries, it appears that, in addition to the marriage of the parents, a formal recognition of the child by both of them was required: see *Re Wright's Trust* (1), at p. 613. In the eye of English law, however, in the narrower sense, legitimation was impossible, except, of course, by Act of Parliament. A child born illegitimate remained illegitimate until its death, with all the consequences which that status implied. These consequences affected not merely the child itself, but also its mother and its natural father, whose rights and duties towards the child were governed accordingly. This rigid rule of English municipal law has been qualified to meet the case of legitimation by subsequent marriage of the parents in cases where the law of the father's domicil at the time of the birth of the child and the law of the father's domicil at the time of the subsequent marriage recognise such legitimation. In these cases, the English courts recognise the legitimation as effective. Where, however, the law of the father's domicil at either of the two times stated did not recognise such legitimation, the marriage was regarded as inoperative to effect legitimation, notwithstanding that the law of the father's domicil at the other of the two times recognised legitimation by subsequent marriage: *Re Wright's Trust* (1); *Udny* v. *Udny* (2) and *Re Grove, Vaucher* v. *Treasury Solicitor* (3). The special case of heirship to land in England need not be considered.

An alteration of the law has been effected by the Legitimacy Act, 1926, s. 8, which enables legitimation to take place where the law of the father's domicil (not being English) at the date of the marriage recognises the marriage as effective to legitimate the child. In such cases, legitimation takes place as from the date of the commencement of the Act or as from the date of the marriage, notwithstanding that the law of the country where the father was domiciled at the date of the birth did not recognise legitimation by subsequent marriage. It is to be noticed that legitimation under the section is not retrospective, and in none of the cases decided before the Act did any question of retrospective A legitimation arise.

It so happens that the only form of legitimation which has hitherto come up for consideration by the English courts has been legitimation *per subsequens matrimonium.* This was the method of legitimation commonly found in systems of law other than our own, and it was in B relation to this method that the rules adopted by the English courts came to be formulated. So far as we are aware, this is the first case which has arisen in the English courts where a different method of legitimation—namely, legitimation by adoption—has had to be considered. The neat point arises whether the requirements with regard C to the domicil of the father which exist in the case of legitimation *per subsequens matrimonium* must be complied with in such a case, or whether, as FARWELL, J., held, the matter falls to be decided by reference only to the law of the country in which the child was domiciled at the date when the legitimation is said to have taken place.

D It is useful at the outset to consider certain consequences which flow from the view adopted by FARWELL, J. The law of California provides for legitimation *per subsequens matrimonium* as well as for legitimation by adoption by the natural father. Accordingly, if Frederick Charles Luck had married Martha Anne Croft, instead of Alma Hyam, on E July 27, 1922, and had not in addition adopted David Luck, the English courts would not (apart from the operation of the Legitimacy Act, 1926, s. 8) have regarded David Luck as legitimate, since Frederick Charles Luck was domiciled in England at the date of the birth. If, however, in addition to marrying Martha Anne Croft, Frederick Charles F Luck had adopted David Luck with her consent, the English courts would have recognised the legitimation. This result would be anomalous, to say the least of it. A result even more anomalous would follow in a case where a man had two illegitimate children by two different women. If he subsequently married one of them, but did not trouble to adopt her G child, and then adopted, with the wife's consent, the child of the other woman (apart always from the Legitimacy Act, 1926), the former child would be regarded in this country as illegitimate, while the latter would be regarded as legitimated. These considerations, in our view, afford some reason for adopting, upon grounds of convenience, a uniform H principle applicable to both cases. This by itself, however, is not sufficient, and it becomes necessary to examine the authorities in which the rules applicable to cases of legitimation *per subsequens matrimonium* have been laid down.

The earlier reported cases relate to the law of Scotland. The case which settled the Scots law as to legitimation was *Munro* v. *Munro* (4).

Before that decision, it had not been finally decided that the domicil of the putative father affected the status of the child: *per* Lord St. Leonards in *Shedden and Shedden* v. *A.-G. and Patrick and Patrick* (5), at p. 634. In *Munro* v. *Munro* (4) it was decided, in the words of Lord Cottenham, L.C., at p. 874:

A

> . . . the child of a Scotchman, though born in England, would become legitimate for all civil purposes in Scotland, by a subsequent marriage of the parents in England, if the domicil of the father was, and continued throughout to be Scotch.

That is to say, such a child would be legitimate if the domicil of the father were Scottish both at the time of the birth and at the time of the marriage. Scots law, he said, at p. 873, "does not admit the indelibility of bastardy," thus differing from English law. B

Apart from *Birtwhistle* v. *Vardill* (6), which dealt with the special matter of heirship to land in England, the earliest English case appears to be *Re Wright's Trust* (1), decided by Sir William Page Wood, V.-C. In that case, a domiciled Englishman, who was the putative father of an illegitimate child, afterwards became domiciled in France, where he married the mother of the child. The effect of the decision upon the point now relevant is stated in the headnote as follows: C

> . . . the law of the domicil of the putative father attached to the child at its birth, and by that law its bastardy was indelible. D

This, in our opinion, concisely states the effect of the decision. Some passages from the judgment will make this clear. After referring to *Birtwhistle* v. *Vardill* (6), Sir William Page Wood, V.-C. says, at p. 607:

> . . . according to the English law, a child not born in wedlock is *filius nullius*; and it is impossible for an Englishman, as long as he remains subject to the laws of England, to render such a child legitimate. The offspring of any woman not married cannot be attributed to any particular father in England except for certain criminal purposes in bastardy. There is no connection between the father and the child and nothing done by the father afterwards can improve the condition of the child. E

Later, he says, at p. 610: F

> A domiciled Englishman having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicil [the domicil of the putative father].

Then he says, at p. 612:

> On every point of principle, the law of the father's domicil having fastened on the child, I am driven to this dilemma: if the child be legitimate, it is the child of one who, at its birth, was a domiciled Englishman; but if that is admitted, and it is conceded that the child was born before marriage, it must be illegitimate, for it has no father by the English law, and nothing can afterwards establish any relationship between the putative father and the child. G

Later, he relies on the decision in *Munro* v. *Munro* (4), notwithstanding that that was a Scots case. He points out the serious results which would follow in the matter of rights to property under (for example) wills if a domiciled Englishman, being the putative father of an illegitimate child, could afterwards legitimate such child, and says, at p. 614: H

> Why is a testator in England to assume that the parent of his legatees may

> introduce illegitimate children to share with them, which he could not do by the law of this country ?

He concludes his judgment by saying, at p. 614 :

> . . . I think, as LORD COTTENHAM, L.C., says in *Munro* v. *Munro* (4), the question in such cases must be, can the legitimisation of the children be effected in the country in which the father is domiciled at their birth, for their legitimacy must be decided A by the law of that country once for all.

This is not an exact quotation of the language of LORD COTTENHAM, L.C., but represents the view of SIR WILLIAM PAGE WOOD, V.-C., as to its effect.

The next case is *Udny* v. *Udny* (2). That was the case of a domiciled Scotsman, but LORD HATHERLEY, L.C., made some important observations B on the law of England. He sees no reason to retract the opinion which he had expressed in *Re Wright's Trust* (1), and proceeds as follows, at pp. 447, 448 :

> The status of the child—with respect to its capacity to be legitimated by the subsequent marriage of its parents—depends wholly on the status of the putative C father, not on that of the mother. If the putative father have an English domicil the English law does not, at the birth of the child, take notice of the putative father's existence. But if this domicil be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro* v. *Munro* (4)) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in D France, or by marriage only, as in Scotland. I do not think that the English law can recognise a capacity in any Englishman, by a change of domicil, to cause his paternity and consequent power of legitimation to be recognised. But however this may be, the question does not, in my judgment, here arise.

The next case to which reference must be made is *Re Goodman's Trusts* (7), a decision of this court. It was there held that an illegitimate E child born to a man domiciled in Holland who subsequently married the mother while he was still domiciled in Holland thereupon became legitimate according to the law of Holland and could take under the Statute of Distributions. COTTON, L.J., says, at p. 291 :

> It was urged in support of the decision of SIR GEORGE JESSEL, M.R., that F the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of status, and in my opinion by the law of England questions of status depend on the law of the domicil.

He speaks here, and elsewhere in his judgment, of the domicil of the G "parents." It would appear that in that case the mother of the child had acquired a domicil in Holland at the date of the birth of the child, so that the domicil of both parents was Dutch at the relevant times. We cannot interpret the reference by COTTON, L.J., to the domicil of "the parents" as meaning that both parents must be domiciled in a H country whose laws recognise legitimation. This would be contrary to what has been said in all other cases, and would be laying down much too rigid a standard. When COTTON, L.J., refers to domicil, his words must be construed as referring to the domicil of the putative father. This accords with the view of STIRLING, J., in *Re Grove, Vaucher* v. *Treasury Solicitor* (3), at p. 222. Upon this interpretation, the passage which we have quoted is in agreement with the view of Sir William Page Wood, V.-C., whose decision in *Re Wright's Trust* (1) is regarded by Cotton, L.J., as consistent with his own (p. 295). James, L.J., says that the status of a person, his legitimacy or illegitimacy, is to be determined by [p. 297]

> . . . the law of the country of his origin—the law under which he was born.

The rest of his judgment appears to us to show that it is the domicil of the father which he regards as the relevant consideration for this purpose, since he nowhere refers to the mother.

Re Grove, Vaucher v. *Treasury Solicitor* (3) was a case decided in this court. The putative father (as the majority of the court found) was domiciled in England at the date of the birth of the illegitimate child and at the date of his subsequent marriage to the mother, his domicil of origin being Geneva, while the mother was a domiciled Englishwoman. All the members of the court took the view that legitimation *per subsequens matrimonium* is recognised by the English courts only where the domicil of the putative father at the time both of the birth and of the marriage is in a country the laws of which recognise such legitimation. Cotton, L.J., says, at pp. 232, 233:

> What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has at its birth in consequence of its father's domicil the capacity of being made legitimate by a subsequent marriage. . . . In my opinion, the domicil at birth must give a capacity to the child of being made legitimate, but then the domicil at the time of the marriage, which gives the status, must be domicil in a country which attributes to marriage that effect.

In the same case, Fry, L.J., says that he agrees with the law as laid down by Cotton, L.J., but he says, at p. 238:

> . . . at birth the child took the domicil of its mother and it took the status of illegitimacy, according to the law of the domicil of its mother, and it took also the capacity to change that status to illegitimacy for one of legitimacy, provided that according to the law of the domicil of the father the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicil and status from the mother but taking the potentiality of changing its status from the putative father.

In the first of these two passages, Fry, L.J., does not say that the question whether a child is illegitimate is to be determined by reference to the domicil of the mother. That clearly could not be so. In our opinion, what he means is that, once it is established that a child is illegitimate, the particular legal consequences which flow from that status are to be ascertained by reference to the domicil of the mother. This is qualified, however, by what he says in the second passage quoted—namely, that one element in the status of the illegitimate child is to be determined by reference to the law of the domicil of the father, that is, the potentiality of subsequent legitimation. Lopes, L.J., agreed with Cotton, L.J.

In our judgment, the principles laid down in the authorities which we have cited are not limited to the one case of legitimation *per*

subsequens matrimonium. It is natural that references to that form of legitimation should have found a place in the statements of the law, since that was the particular form which was relevant in those cases, but the language used is, we think, of wider import. In particular, SIR WILLIAM PAGE WOOD, V.-C., in the passages from *Re Wright's Trust* (1),
A which we have cited, lays down the principle in quite general terms which clearly cover the present case. He regards the law of the father's domicil as "fastening on" the child at its birth, and as determining the nature of their relationship. If, by the law of that domicil, the relationship is immutably that of putative father and illegitimate child, nothing
B thereafter can change it. If, on the other hand, by the law of that domicil, such relationship is not immutable, but is capable of becoming that of father and legitimate child, that capacity, when duly fulfilled, is to be recognised by the courts of this country.

There appear to us to be sound reasons in principle why this should
C be the law. Legitimacy is not a unilateral matter affecting the child alone. If an illegitimate child is legitimated, it is not only the status of the child which is affected. The status of the putative father is also changed, since he becomes what he was not before—namely, the father of a legitimate child, with all the consequential rights and duties which
D flow from that relationship. Moreover, the position of the child is changed as regards the father's relatives, for it acquires the capacity to succeed to their property as next of kin, while they similarly acquire a like right to succeed to its property. If the question of the effect of the adoption of David Luck upon his legitimacy is to be determined by the
E law of his domicil at the time, it will apparently follow that, if he had been legitimated by a *privilegium* enacted by the legislature of California, he would have been regarded as legitimate by the English courts, even if his father had been domiciled in England at the time. In other words, the English courts will recognise the jurisdiction of a foreign legislature
F to impose upon a domiciled Englishman the status of paternity which he did not acquire at the date of the child's birth, and the potentiality of acquiring which he did not at the time possess. We cannot accept a view which would lead to that result.

When the question of legitimation *per subsequens matrimonium* first
G came up for examination in *Re Wright's Trust* (1), the law might have been laid down differently, and it might have been held that the domicil of the father or of the child at the date of the marriage was the sole matter to be considered. The decision of SIR WILLIAM PAGE WOOD, V.-C., in that case was, we think, largely influenced by the Scots law as laid
H down by the House of Lords in *Munro* v. *Munro* (4). It was natural that the English law on this matter should be founded upon the same principles as Scots law, which required the potentiality of legitimation to exist at the date of the birth. The result is that the English authorities have been based upon the principle that, before subsequent legitimation can take place, the status of illegitimacy as acquired at birth under the law

of the domicil of the putative father must have, as an integral part of itself, the potentiality of subsequent legitimation. If it has not this potentiality, it is incapable of change, since the capacity to be changed exists by virtue of the potentiality alone. It is only within these narrow limits, in our opinion, that the English law recognises an exception to the principle that bastardy is indelible, a principle which it always steadfastly maintained in opposition to the civil and the canon law, save in so far as it was forced to recognise an exception in cases of persons not domiciled in England.

It was suggested that a logical distinction between the present case and the case of legitimation *per subsequens matrimonium* might be found in the circumstance that the act of adoption by the father was done deliberately for the purpose of legitimating the child, whereas marriage is contracted for its own sake, and the consequential legitimation is, so to speak, only a collateral result. There appears to us to be no substance in this distinction. Moreover, as we have already pointed out, it appears from *Re Wright's Trust* (1) that by French law an act of recognition was required in addition to the marriage, and it was not suggested that this circumstance in any way affected the principles to be applied.

We may conclude this part of our judgment by a reference to the views of the late Professor Dicey. In DICEY'S CONFLICT OF LAWS, 3rd Edn. (the last in which his name appears as an editor), the following passage appears, at p. 532:

> What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign? Suppose that a person born illegitimate is legitimated by a decree of the King of Italy, or under an Act of an American state, will such a person be held legitimate here? There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicil of such person's father at the time of his birth and at the time when the decree was issued. Suppose, that is to say, that the child's father were domiciled in Italy at the time of the child's birth and at the date of the decree, then the decree would have the effect of making the child legitimate in England. If, on the other hand, the father were domiciled in England, either at the time of the birth or at the date of the decree, the child would apparently not be legitimated in England thereby.

The view which he favours is the same as our own. In DICEY'S CONFLICT OF LAWS, 5th Edn., the editor, Professor Berriedale Keith, has altered this passage. The question which he formulates is this, at p. 570:

> Suppose that a person born illegitimate is legitimated by a decree of the government of Italy, or under an Act of an American state, through declaration made by a parent or otherwise, will such a person be held legitimate here? . . . very possibly the answer is simply negative.

He then goes on to describe Professor Dicey's answer as a "possible" one, adding, at p. 570:

> . . . in view of the adoption by the Legitimacy Act, 1926, s. 1, of the time of marriage as the decisive moment, it may be that the time of recognition would alone be deemed of importance and the domicil of the father at the time be deemed decisive.

We prefer the view of Professor Dicey, and we cannot see that the terms of the Legitimacy Act, 1926, can affect the matter.

The alternative argument advanced by the appellants only affects the share of Frederick Charles Luck under the marriage settlement of his parents. It is said that, even if the legitimation of David Luck is held to be valid and to operate retrospectively to the date of his birth, he cannot take under the settlement, because the legitimation did not in fact take A place until after the expiration of the period of 21 years from the death of the settlor within which issue must be born in order to take a share. FARWELL, J., rejected this argument, but, as our decision upon the question of legitimation makes a decision upon the point unnecessary, we express no opinion upon it. In the result, the appeal is allowed. B The order of FARWELL, J., will be varied by substituting for the declaration which he made a declaration as asked for by the notice of appeal to the effect that David Luck is not entitled to any share in the shares, original or accruing, of Frederick Charles Luck under the marriage settlement and the will.

C

SCOTT, L.J.: Before writing this judgment, I had the advantage of reading the majority judgment. I accept its narrative of the facts, subject to certain qualifications in regard to inferences from the evidence bearing upon the domicil of David Luck and of his father and mother in D the earlier years of his life. I recognise the force of much of its reasoning, but I cannot agree with its conclusions. In my humble opinion, it fails to give due effect to the law of personal status in private international law as applied in English courts. It predicates of the decisions on which it relies a relevance which they do not possess, and it attributes E to opinions expressed in those cases a generality of application which, if intended, was not justified by the peculiar consideration affecting the law of legitimation by subsequent marriage with which they were concerned. In any case, for the purpose of this appeal, I regard those opinions as *obiter*, and as not binding upon this court in the present case, upon F which I know of no direct authority.

In regard to the facts, I am at one with my colleagues in rejecting the submission made on behalf of David Luck that the latter's father was, at the date of his birth, already domiciled in California. The evidence to that effect was not enough to shift the burden of proof. On the other G hand, I think that the evidence does suffice to establish his Californian domicil not very long afterwards. He was then already living with the mother at a house in Whittier, California, and was publicly referring to her as Mrs. Luck. He bought this house in 1907, and, except for absence which proved temporary, they lived there till 1911, when they H moved to Chicago Park, also in California, where he purchased a house and fruit ranch. They lived there till 1916, when they moved to Oakland, California, for the sake of the boy's schooling, and lived there together till 1918. They then separated, probably because he had fallen in love with the Californian woman whom he married in 1922, after the Californian court had dissolved his marriage with his first wife. On the above facts, but for the doubts thrown upon his intentions in the early years by the evidence to which my colleagues refer, I should have inferred that he had made California his " permanent home " not later than 1907. However, I think that those doubts are disposed of by his abandonment of his Arizona schemes in 1910, confirmed by his subsequent purchase of the fruit ranch in 1911. The evidence also, in my view, justifies an A inference of fact that the mother, too, made California her " permanent home " either contemporaneously with, or immediately after, the father's change. Several considerations point that way. From before David's birth, she had called herself his wife, and wholly identified her life and her home with his. She had faced the difficulties of an unmarried mother B once, and no doubt shrank from either taking or refraining from any step which might jeopardise the union with him of life and home, and bring her face to face with those difficulties again. She evidently was fond of him, and was under his influence. Her affidavit also shows that financial reasons must have influenced her mind in the same direction. C I therefore conclude that, for all those reasons combined, she adopted a Californian domicil when he did, or very soon after. It is worth noticing that there is no positive evidence whatever the other way, as there was in *Re Annesley, Davidson* v. *Annesley* (8), where RUSSELL, J., at pp. 701-702, discussed the law of domicil, and, in spite of strong contrary evidence, D held that a change of domicil was proved. As soon as she changed her domicil, David, by operation of law, followed suit. I have dealt with this issue of fact as to the dependent domicil of David lest, if the case go further, it should be held, contrary to what I venture to think myself, that a Californian domicil at some earlier date than that of legitimation is E essential for the father, or, at or before that date, for David.

The first task of the court below was to ascertain, with such expert evidence as was given, the meaning of the Californian statute, and, on that evidence, the judge was left as we are left, to construe its language. I think that SIR WILFRID GREENE, M.R., and LUXMOORE, L.J., concede F that, by Californian law, David Luck was, in California, made completely legitimate from birth, but they hold that it is contrary to English law to recognise the resulting status of legitimacy as in any way touching his illegitimacy prior to the moment of legitimation, basing their view on the ground that the father had not his Californian domicil at the G moment of the son's birth. The phrase " English law " means " the whole of English law," including the principles of private international law as administered in English courts (*Re Askew, Marjoribanks* v. *Askew* (9), and the cases there discussed by MAUGHAM, J.), and in this judgment I use the phrase in that sense, unless the context indicates H otherwise. Conversely, the phrase " the whole of Californian law " may include principles of English law, in so far as they are proved to be incorporated in Californian law. Hence the theoretical possibility of some doctrine of *renvoi* in Californian law.

It may be convenient that I should at once state my own reasoning, leaving till later the main support for it from decided cases and the opinions of jurists. On Oct. 23, 1925, by reason of his status of a domiciled Californian, the father was duly qualified by Californian law to avail himself of sect. 230 of the code, and he did so. Californian law thereupon clothed David in California with the status of a legitimate son of his father. I construe the statute as conferring legitimacy from birth. If I am right in thinking that David's mother had already acquired a Californian domicil, David had, by operation of law—through her, because of his illegitimacy—already acquired a Californian domicil, and, therefore, then possessed the status of an infant domiciled Californian. Alternatively, if I am wrong in that inference of fact, and if, therefore, David, at the moment of legitimation, still had his domicil of origin, the same consequence would result in another way. Upon the acquisition of his status of legitimacy, he would, by operation of law, enter into the dependent relationship to his father of a legitimate infant son, and that relationship would automatically import for him the same domicil as that of his father. Therefore, upon legitimation, *quacumque via*, David had the status of a legitimate son and a Californian domicil. When the question arose of his right to enforce in England his claim as the legitimate son of his father to share in the personalty covered by his grandfather's settlement and will, the facts and legal principles material to his cause of action were, in my opinion, these. (1) His status in California was that of a legitimate son of his father, with a domicil in California. (2) That status, established by the law of that "foreign country," was, under English law, one which it was the duty of an English court to recognise, and *prima facie* to enforce, in accordance with its nature and attributes, as determined by the law of that country, proved in the usual way. I use the words "foreign country" in the sense given in DICEY'S CONFLICT OF LAWS; (3) There was no evidence of *renvoi* in Californian law. (4) An English court cannot reject, qualify, or make an exception from the context of, the foreign status, unless there is some definite and positive rule of English law, written or unwritten, forbidding the application of the foreign status, or commanding some specific qualification or exception. My colleagues think that there is such a rule, and find it in the decisions about legitimation by subsequent marriage, which postulate the possession by the natural father of the same domicil at the date of the birth and at the date of the marriage. I recognise that, in a case of subsequent marriage, I should be bound by *Re Grove, Vaucher* v. *Treasury Solicitor* (3), although I have great difficulty in grasping the legal justification of that rule, even in such a case. However, neither FARWELL, J., nor I, think it relevant to the present case. Out of respect for the judgment of my colleagues, however, I must state fully my reasons for dissenting, the more so as FARWELL, J., did not find it necessary to explain why he thought that those cases are irrelevant to the present case.

In that branch of English municipal law which is indifferently known as private international law or conflict of laws, there are three legal conceptions relevant to this appeal—namely, domicil, status and legitimacy. Domicil is, normally, the factor which brings into operation the law which creates status. Legitimacy is just a particular kind of status. Status is in the main a matter of personal capacity. Story's Conflict of Laws, Chapter IV, so describes it, and it is helpful to keep that aspect of it in mind. In regard to domicil, there is no divergence of principle between my colleagues and myself as to its nature, or as to the manner in which a change of domicil happens or is proved, but, whereas in countries whose system of law is based on the civil law, or the Napoleonic Code, nationality has become the foundation of status; in England, and in all countries whose system derives from our common law, domicil is its normal foundation. However, the normal rule of English municipal law that status depends on domicil may perhaps not cover every origin of status. This difference of view as to the foundation of status does not prevent substantial identity of English and continental views about status when it is created. When a certain status accrues to a person, it is the same personal status, whether it rests on the foundation of domicil or on that of nationality: *per* Lord Phillimore in *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator* (10), at p. 670. Legitimacy is status in one set of human relations—namely, that of the family—but it is the general principles of the English law of status which I think throw most light on the nature and scope of the particular status of legitimacy. From one point of view, legitimacy is the positive status of which illegitimacy is the negative, but that verbal contrast is not very helpful to an understanding of the true extent of the change in status from illegitimacy to legitimacy brought about by the act of law called legitimation. When the status of legitimacy is given to an illegitimate person, it is so given by the law of the country which creates his general status, although, except where a sovereign legislature passes a statute making a named person legitimate, as a *privilegium* or *rescriptum principis*, it is always upon the action of some person—usually the natural father—that the law is put into motion. Whether or not the father can do that depends on his status in the country whose law is to be put in motion. As long as the father of David had an English domicil, his status under English law conferred on him no power to legitimate David. When he acquired a Californian domicil, his status—and, therefore, his personal capacity—did change, because the local law created in him a status which carried that power, and defined the conditions for its exercise. When he had exercised it, the law *ipso facto* conferred on David the status in California of a legitimate infant son.

Of the three conceptions, status is the most far-reaching, and, in my opinion, its general principle provides the key to the solution of the present problem. It constitutes, as it were, a legal genus. It contains many species, all of daily importance in civilised life. In Dicey on Domicil, the table of contents enumerated 7 particular kinds of status—

namely, parent and child, guardian and ward, infancy, legitimacy, husband and wife, lunatic and curator or committee, corporation. There are also others. Testamentary and intestate succession to personalty, for instance, depends primarily on the legal attributes attaching to the status of the deceased, even if his status has been acquired through A domicil. Domicil in the country concerned is important, because English municipal law treats it as the prime factor in bringing into operation the local law which creates the status and gives it its legal content, and, generally speaking, there is no difference in this respect as between one species of status and another. Status is in every case the creature of B substantive law. It is not created by contract, although it may arise out of contract, as in the case of marriage, where the contract serves as the occasion for the law of the country of the husband's domicil to fix the married status of the parties to the contract. Perhaps the most far-reaching characteristic of status, and that most material to the C decision of the present case, is its quality of universality, both in the general jurisprudence of other nations and in private international law as applied by English courts. The general principal of status is that, when it is created by the law of one country, it is, or ought to be, judicially recognised as being the same everywhere, all the world over. By D everywhere, I mean at least in every "country" where the rule of law prevails, and again I use the word "country" in Dicey's sense. Status affects not only the relations of the person to the public, but also those of the public to him. All are interested, and that is one reason why, when a competent court in any country adjudicates upon the particular E status of some person, it recognises the presence or absence of that status, and its judgment has effect as a judgment *in rem*. I have ventured the phrase "is or ought to be," because, since the end of the eighteenth century, English law has been tending more and more to accept—and, in my opinion, now does accept—the general principle that status F acquired in one "country" ought, *prima facie*, and subject to certain exceptions due to local rules of positive law, to extend and be applied everywhere. Authority for much of what I have just said is contained in the opinions of the House of Lords in *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator* (10), in which the status in question G happened to be that of married persons; see *per* VISCOUNT HALDANE on the respective natures of domicil and status, and the effect of a judgment on status being that of a judgment *in rem*. He said, at pp. 652, 653:

> H The status of married persons as dependent on divorce is a matter for which the court of their domicil is the appropriate court, and its decision is treated by our courts as not only being valid but as conclusive. . . . If this was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding on third parties as having been a judgment *in rem*. For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which private international law recognises as having

> been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This juridical result is more than any mere outcome of the agreement *inter se* to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of. There is nothing unusual in this doctrine. . . . When, therefore, it is necessary to determine what married status implies and how far rights or acts are affected by it, A
> it is necessary to determine the law by which they are fixed.

In the same case, LORD DUNEDIN expressed general concurrence as to the meaning of status and its legal aspect of a *res*, at p. 662, and again in his fifth proposition, at p. 663. LORD PHILLIMORE said, at pp. 670, B
671:

> As to the general principles of international law upon this subject as viewed by British courts it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively. I have used the expression "the law which determines the personal status" because there are C
> countries which would refer to nationality rather than to domicil; but the principle is the same. The text first quoted in *Shaw* v. *Gould* (11) and then cited in *Le Mesurier* v. *Le Mesurier* (12), and in *Lord Advocate* v. *Jeffrey* (13), was not, I apprehend, intended to be confined to decrees which effect something, but deals also, if not primarily, with decrees which decide upon the existing status. *Quum de statu et conditione hominum quaeritur uni solummodo judici et quidem domicilii universum in illo jus est attributum.* D

He was there in effect commenting on the quotation from ERLE, C.J., in *Hobbs* v. *Henning* (14), at p. 823, which counsel had cited in argument at p. 645.

Before the nineteenth century, status had gained only incomplete recognition as a separate juridical conception, and its genesis, nature E
and attributes had not been fully explored. Indeed, in 1834, STORY ON CONFLICT OF LAWS, 1st Edn., sect. 10, said of the whole subject of private international law:

> The subject has never been systematically treated by writers on the common law of England; and, indeed, seems to be of very modern growth in that kingdom; F
> and can hardly, as yet, be deemed to be there cultivated.

One notices in certain judgments of the first half of the nineteenth century some confusion between domicil as the cause, and status as the effect, of the foreign law operating, and between domicil and nationality and occasionally—for example, in marriage cases—between contract G
and status. The historic parting of the ways between English law, which saw in domicil the main deciding factor in the creation of status, and continental law, which, especially after the adoption of the Napoleonic Code, relied on nationality, almost escaped notice in England till after the middle of the century. There is a footnote by Sir H
Frederick Pollock in *Re Askew, Marjoribanks* v. *Askew* (9), which is in point. He said, at p. 265:

> The substitution of nationality for domicil by modern continental doctrine and legislation as the criterion of personal law was at that time [1869] a novelty.

The adjective "personal" in the phrase "personal capacity" refers

primarily, no doubt, to the natural person, but a juridical person also has a status—for example, a corporation at common law, or by statute, or a limited liability company. In some legal systems, the *persona juridice* includes unincorporated groupings of persons such as English law has never personified. The complications of such "persons" are
A foreign to the issues of this appeal, but the combined requirements of comity and practical convenience, which are so obvious in the case of the artificial person, that the same status should attach everywhere are in truth essential also to the status of the natural person, and show the underlying reason for the doctrine of its universality.

B These elementary reflections lead, inevitably, as I think, to the conclusion that universality is the basic principle of status in private international law—both in general and in the intendment of English law —that the particular status brought into existence by the law of country A must have attributed to it by country B the self-same personal capacity
C or incapacity, and the self-same rights and duties, which country A conferred or imposed upon that person, natural or artificial, and that the courts of country B can introduce into that status no exceptions or qualifications unknown to the law of its creation, unless they are bound to do so by some definite and positive rule of municipal law, whether
D statutory or common law, which prohibits them, as in *Birtwhistle* v. *Vardill* (6), from giving effect to the country A status, or commands them to introduce some specific condition or other modification when asked to apply the consequences which by the law of country A would flow from that status in the particular circumstances of the case before
E them.

The preceding considerations about status reduce within a narrow compass the questions which, in the present case, remain open in regard to domicil. To the exercise of the father's facultative right in California, conferred on him by reason of his domicil under Californian law, neither
F the domicil of David's mother nor the domicil of David himself had any materiality, for neither is called for by the language of the statute; nor had the domicil of the father himself at any time anterior to the exercise of his right, for the same reason. Whether or not the Californian Act required him then to have the status of a domiciled
G Californian need not be discussed, for he in fact possessed it then, which was the only time when, on the true interpretation of the statute, it could conceivably matter in California—namely, the moment of his taking action pursuant to the statute. Since he was then domiciled in California, I cannot entertain any doubt that he then enjoyed, through his
H status of a man domiciled in California, full personal capacity to confer on his son David whatever status of legitimacy in California the Californian statute intended should be created for a son's benefit. The question of fact as to what the father's domicil had been at the moment of birth (or of conception, as was suggested in some of the early decisions about legitimation by subsequent marriage), or at

any intermediate time, cannot, as far as I can see, have any bearing upon the status of David in California, as resulting by operation of Californian law from the action of his father pursuant to the facultative provision of the Californian statute. There is not a word in the section which imposes any such condition upon his power of conferring the status of legitimacy upon his son. If the father's status at the date of those two earlier events has any relevance in this appeal, as Sir Wilfrid Greene, M.R., and Luxmoore, L.J., think that it has, it must be solely because English municipal law imposes that limitation in England. If, at the moment of the legitimation, David's mother had already acquired a Californian domicil, as I think she did some time before 1917, David, as her dependant, had equally a domicil in California. If that fact is not to be regarded as proved, however, there may arise for consideration the question of law as to whether since in English municipal law domicil is generally a condition precedent to the acquisition of a foreign status, this court is compelled by that law to refuse recognition of David's legitimacy because he did not then possess a Californian domicil although his father did. I think that it is not, for two reasons. First, not only did the Californian statute give him there a status of legitimacy from birth, but also it was a necessary incident of that legitimacy that he should automatically come into the dependent relationship of a legitimate son to his father, and, as that relationship was inherent in the legitimacy, it, too, must be deemed to have attached from birth. This legal presumption would cause David to have had from birth the same domicil as his father—namely, English for the first few years of his life, and then, from the date of the father's acquisition of his domicil of choice, a Californian domicil. The second reason is wider and all-embracing. The only status which matters at the moment of legitimation is, in my opinion, that of the father. If he had the capacity to legitimate, the Californian Act did the rest. David's legitimacy in California was equivalent to original legitimacy. He was as legitimate as he would have been if he had been born legitimate, and there is, in my opinion, no prohibitory rule in English municipal law which can entitle this court to refuse to apply the general rule of universality of status, which I regard as part of English law. To my mind, the supreme importance of attributing universality to status, when it is created, should give it priority in resolving the problem raised by the apparent conflict with it of the rule of English municipal law, which at first sight seems, on the decided cases, to attribute status exclusively to domicil. That is not necessarily so, however, for I am not satisfied that English law rejects status, when created by nationality in those countries which act upon that rule, unless domicil as well as nationality is proved. In the second place, it is our duty, I think, to have regard to the intention of the Californian Act to make a legitimated son wholly legitimate—not from the moment of legitimation, but from birth—not only in California, but the world over. To that

major consideration of status in private international law the minor consideration of domicil in English municipal law should, I think, give way, and allow the court to admit that particular origin of status, in a case like the present, as an exception to the normal rule that domicil is the cause of status. There may perhaps be added the further con-
A sideration that, in the Continental system, as I believe, the rule of had a potential legal *nexus* with his father from the moment of the legitimation.

There is one more point about domicil which deserves mention, and calls for caution. In the "subsequent marriage" cases, there are
B expressions of judicial opinion to the effect that the reason for insisting on the father's domicil at the date of the birth is that that would give to the child a "potential capacity for future legitimation." Frankly, I do not understand that idea, but, if it has any solid basis, it might be a ground for praying in aid the fact (which I regard as immaterial)
C of the father's acquisition of a Californian domicil before July 1, 1917, with its resultant personal capacity in him to resort thereafter to the Californian law of legitimation, and for holding that David in that way had a potential legal *nexus* with his father from the moment of the father's acquisition of a Californian domicil.

D The meaning which, as already appears, I attach to "legitimacy," both under the Californian statute and in English municipal law, calls for a little separate consideration. An absolutely sovereign legislature can do what it wills in legislation. It can take a word with a normal meaning in English law and use it with an abnormal meaning, and it
E can do so either expressly or by necessary implication. In 1926, Parliament, in enacting the Legitimacy Act of that year, deliberately passed a half-measure. By sect. 1, it not only limited statutory legitimation to the one case of subsequent marriage of the natural parents, but also provided that such so-called legitimacy should operate only

F . . . from the commencement of this Act, or from the date of the marriage, whichever last happens.

Thus, it gave to the word "legitimate" an abnormal meaning. However, the statutory misuse of a word in a non-normal sense cannot affect its non-statutory and normal meaning. The normal meaning of the
G word "legitimate" in English municipal law is that the person in question has the legal status of one born of a mother who then possessed in relation to a living husband (having access) the legal status of marriage, or who, if her husband was already dead at the time of the birth, had possessed that status within a possible period of gestation. "Legiti-
H macy" denotes the status of a child so born. "Legitimation," therefore, in its normal sense, denotes an act of law by which the status of legitimacy is conferred on a person not so born. Parliament can pass a personal Act, a *privilegium*, or "*rescriptum principis*," as Bar calls it, saying that A.B., an illegitimate person, shall be made "legitimate," or have the legal status of "legitimacy." Many such *privilegia* were

passed in earlier centuries of English history. So also Parliament could —as the Californian legislature did—pass a general Act enacting automatic legitimation in specified circumstances and conditions, or permitting natural fathers themselves to invoke the law by performing some specific action and thereby causing the law to abolish the illegitimacy and substitute the status of legitimacy.

At the hearing, it was argued for the appellants that retrospective legitimation is impossible in English law, and, further, that the words "from the time of its birth" at the end of the Californian section must be disregarded in an English court, because they do not create status, but merely constitute retrospective legislation. I do not rely on those words. The Californian Act used the word "legitimate" without any limitation or other qualification, and the word must be there construed in its natural and normal sense. The last 6 words appear to me to have been inserted only *ex majore cautela.* They do not add anything to the meaning which the word would have had without them. A statement that a person is "legitimate" means that his condition or status is that of a person born in lawful wedlock, and an enactment of legitimacy must equally mean that. English law, indeed, has already accepted that principle. In every case of legitimation by subsequent marriage in the English courts, the result was retrospective, for it substituted legitimacy for illegitimacy as from birth. The argument that, during the period from birth to the subsequent marriage, the bastard was *filius nullius,* and his bastardy indelible, and that, therefore, no subsequent marriage could, in English municipal law, undo the past, was brushed aside by the courts, although with the wholly illogical answer that, if the father had been domiciled in the appropriate country during the whole of that period (when *ex hypothesi* there was no relationship between him and his natural son), it would suffice to confer legitimacy from birth. However, under cover of that excuse, the courts did in truth recognise retrospective legitimacy.

Upon the question of the true meaning of "legitimacy" and the necessarily retrospective effect of legitimation, I will pray in aid the argument addressed by LORD MACNAGHTEN when counsel before CHITTY, J., in *Re Ullee* (15). The question was whether the children of an Englishwoman married in due form by a Mahommedan ceremony of marriage to an Indian Moslem nawab who had already one wife, the marriage being legal in Mahommedan law, but a nullity here because English law forbids the recognition of polygamy, had been made legitimate by his subsequent acknowledgment of them as his children and heirs. He said, at p. 712:

> The Mahommedan law is that, if a man acknowledges another to be his son, and there is nothing which obviously renders it impossible that he should be his son, the parentage is established.

He added, referring to the "subsequent marriage" cases [p. 712]:

> Such children are legitimate for all purposes except as to their status in respect of rights in real property in England.

That was an obvious reference to *Birtwhistle* v. *Vardill* (6). CHITTY, J., did not purport to decide the question, but he said, at p. 713:

> That the Mahommedan law allows recognition to establish legitimacy is clear from the authorities referred to by Mr. Macnaghten in his argument. To what extent the English law would in that respect yield to the Mahommedan law is, as already stated, an open question. . . . I am by no means satisfied that, according to the principles of international law as now understood, I ought to hold the infants now in question to be for the purposes of the application illegitimate, but it is immaterial to give any decision on that point.

The judge was clearly not rejecting the retrospective principle. In *Skottowe* v. *Young* (16), to which I shall refer later, the decision itself accepted the retrospective principle.

I shall now refer to some of the decisions other than *Salvesen's* case (10), and I shall then cite some passages from leading jurists which I think support the principles of the preceding observations. *Monro* v. *Ross* (17) was a case of a claim based on an alleged status of legitimacy acquired through the Scottish law of legitimation by subsequent marriage, but the father had an English domicil, and at no time a Scottish domicil. The House held that the father's status depended on his domicil, and that his son was not legitimated, because the law of the father's domicil was English, which did not include the Scottish rule of legitimation by subsequent marriage. *Warrender* v. *Warrender* (18) was the converse case. A Scotsman, whose domicil was in Scotland, married an English woman in England, and spent most of his life in England, but never lost his Scottish domicil. After a time, the husband and wife entered into a deed of separation. At a later date, during the separation, whilst the wife was living abroad, the husband started proceedings in the Scottish Courts for dissolution of the marriage, on the ground of the wife's adultery. The question was whether that court had jurisdiction to dissolve the marriage, and, therefore, to direct service of process abroad on the wife, since she was by birth an Englishwoman, and since the marriage took place in England. The House of Lords held that the husband's domicil gave the Scottish court jurisdiction to dissolve the marriage. The principles involved in these two decisions and relevant to the present case are that status depends normally on domicil, and that the proper law of the status is the law of the country of the domicil, by which I mean the whole law of that country, as was explained by MAUGHAM, J., in *Re Askew, Marjoribanks* v. *Askew* (9), jurisdiction being merely one consequence of the law of the status. These principles were affirmed in *Birtwhistle* v. *Vardill* (6), which was argued before the House of Lords in 1830, and again in 1835, when it was adjourned. It was re-argued in 1839 and decided in 1840. The claim was to the inheritance of land in England by the son of a father and mother not married when he was born, but having a Scottish domicil both at the date of his birth and when they subsequently intermarried. The son became completely legitimate under the law of Scotland, and accordingly, under that law, succeeded to his father's estates in Scotland as his lawful heir. However, the English judges advised, and the House held, that legitimacy is not enough to enable a claimant to succeed to the heirship of land in England unless the legitimacy arises from actual birth in lawful wedlock, because the common law of England forbids inheritance to English land to any not so born. This view was expressed by the judges in their advice on both occasions, and the reasoned opinion A of TINDAL, C.J., who had argued for the claimant in the King's Bench, which was delivered by him for the judges at the final hearing in July, 1839, was treated by the House as clearly demonstrating that there was in England a positive and inflexible rule of law which absolutely forbade a son not born in wedlock to succeed as heir to English land. The B *ratio decidendi* is not relevant to any point in this appeal, but the case could not have been argued at all except upon the footing of the English courts recognising and applying the Scottish status of full legitimation, unless so prevented by a positive prohibition. There are certain passages, both in the advice of the judges on each occasion and in the C opinions of their Lordships, which are weighty expressions of opinion on domicil, status and legitimation. In the advice of the judges at the first hearing, delivered by ALEXANDER, C.B., there is a passage, quoting LORD STOWELL in *Dalrymple* v. *Dalrymple* (19), at p. 58, in which it was said that the question of the status of the claimant must be adjudi- D cated [p. 574]:

> . . . "according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the country where the *status* originated; having furnished this principle, the law of England withdraws altogether, and leaves the question of *status* in the case put to the law E of Scotland." Such is the sentiment of that great judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage. When the question of personal *status* has been settled upon these principles, and when it has been ascertained what the claimant's character and situation are, it becomes then necessary to inquire what are the rules and maxims of inheritance which the law of that country where the inheritance is placed, and whose tribunals are to decide upon it, has stamped and impressed upon the land in debate. F

Later, he said, at p. 575:

> The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character; but what these rights are respecting English land must be left to the law of England, and the comity is totally ineffectual G to alter, in the slightest degree, the rules of inheritance and descent which the law of England has attached to this English land.

He added, at p. 576:

> The distinction to which I am directing your Lordships' attention is very familiar to foreign jurists, and is noticed by them as the difference between real and personal H *status*; the last being those which respect the person, and follow it everywhere; the first being those which are connected with the land, and adhere to it, and are as immovable as the subject to which they are applied.

It is to be observed in the passages quoted from pp. 575, 576, that the judges expressed opinions directly relevant to the present case, which I venture to paraphrase thus. (1) By private international law, as applied in English courts, a person's status of legitimacy created by the law of the country of his domicil by reason of his domicil there extends everywhere, and must accordingly be recognised by English courts as the same status. (2) All those rights which respect the person, as distinct from those which respect realty in England, must by the law of England A be recognised and enforced by English courts. On the second hearing 4 years later, in July, 1839, Tindal, C.J., in a fully reasoned opinion of extraordinary interest, in which he submitted, at pp. 934, 935, that the law of inheritance in England was fatal to the claimant, did express the view that a marriage valid by the law of the parties' domicil would be B held valid everywhere, and, I think, he implicitly accepted the principle that a party legitimate in one country is to be held legitimate all over the world. He also drew attention, at pp. 935, 936, to some of the curious fictions upon which legitimation by subsequent marriage between the natural parents had been justified, as, for instance, the Scottish theory C that they had made an actual contract of marriage at the time of conception. This fiction had been referred to by Lord Cottenham, L.C., in the two previous cases, *Dalhousie* (*Countess*) v. *M'Douall* (20), and *Munro* v. *Munro* (4) (a joint judgment in which was given on the same day as the judgment in *Birtwhistle* v. *Vardill* (6)), at pp. 871, D 872:

> To whatever principle the law of legitimation by subsequent marriage be attributed, there can be no doubt of the generality of the rule where the parents were capable of contracting marriage at the birth or conception of the child. Wherever, therefore, a marriage follows the birth of children procreated by the parties to the marriage, all the requisites concur which are required by the terms in which the E rule is laid down, assuming always that the circumstances are such as to bring the case within the operation of the law of Scotland; and as the laws of every country generally affect all those who have their domicil in such country, it would appear that, in order to bring any particular case within this rule of the law of Scotland, it could only be necessary to show that the domicil of the parties was Scotch. The consideration is of much importance in a case in which it is said that no precedent can be found in which the particular facts of this case occurred; because if the case falls within the terms of the general rule, such rule must govern it, unless it can be F shown that there is principle or authority for making it an exception to the general rule, and withdrawing it from its operation.

Effect was given to this principle on the facts of both cases. Incidentally, it is to be observed that Lord Brougham, in his opinion in *Munro* v. *Munro* (4), twice refers to the necessity of the Scottish domicil of the G "parties" at the time of the marriage, but makes no reference to any such necessity at the time of the conception or birth.

In *Shaw* v. *Gould* (11), Lord Cranworth said of *Birtwhistle* v. *Vardill* (6), that the opinions there given [p. 70]

> . . . seem to me to shew a strong bias towards the doctrine that the question of H status must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicil.

Skottowe v. *Young* (16) was a case of legitimation of two illegitimate daughters by the father's declaration under French law, upon his subsequent marriage with the mother, he being an Englishman then and from before their birth domiciled in France. The grandfather had made a will leaving land in England to trustees to sell and hold the proceeds in trust "for his children." The Inland Revenue claimed legacy duty at the higher rate, contending that the two daughters were "strangers in blood" within the Legacy Act, 1815, s. 2, and not conceding the lower rate of 1 per cent. payable on legacies to legitimate children. Sir John Stuart, V.-C., said, at p. 477:

> If, as seems clear, the daughters of the testator are legitimate by the law of France, and must, therefore, in this country be considered as having the status of children, it is difficult to see how, in any sense, they can be "strangers in blood." Where the Legacy Duty Act uses these words, it is as a description of the status of the person.

After distinguishing *Birtwhistle* v. *Vardill* (6), he concluded as follows:

> The status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English and their father domiciled in England, they would have been illegitimate.

Accordingly, he held that the legitimated children were not "strangers in blood." In *Re Goodman's Trusts* (7), Cotton, L.J., quoted *Skettowe* v. *Young* (16) with approval.

Sottomayer v. *De Barros* (21) is an instance of a disability or incapacity attaching to a person's status under the law of his domicil being enforced by our courts, although in English municipal law the circumstances would entail no disability. The court added, at p. 6:

> All persons are legally bound to take notice of the laws of the country where they are domiciled.

In *Harvey* v. *Farnie* (22), the Court of Appeal recognised as valid the decree of a Scottish court dissolving the marriage of a domiciled Scotsman and an Englishwoman, although the marriage was solemnised in England, and was dissolved upon a ground for which by English law no divorce could have been granted. The case came before the court on a petition by a second wife, whom the respondent had married after obtaining his divorce in the Scottish courts, asking for a declaration of the nullity of the first marriage. Cotton, L.J., discussed the legal incidents and liabilities of the status due to domicil, and said:

> . . . I take and adopt entirely what was said by Lord Westbury in the case of *Shaw* v. *Gould* (11): "But this right to reject a foreign sentence of divorce cannot rest on the principle stated by Kindersley, V.-C., in his judgment, namely, that where by the *lex loci contractus* the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which for the sake of general convenience and by tacit consent are received by Christian nations and observed in their tribunals. One of these rules certainly is, that questions of personal status depend on the law of the actual domicil."

The case went to the House of Lords, where Lord Selborne, L.C., said, at p. 50:

> Now, I must take the liberty of saying that . . . although it cannot be denied that the varying jurisprudence, and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those

> different countries on questions of matrimonial status, yet I should certainly say that in such circumstances as those which exist in the present case the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries. Of course, I assume that in the way of that recognition there would not be interposed any positive legislation bearing upon the point, or any positive prohibition of its own law binding upon the court in which the question arises.

In the same case, LORD BLACKBURN said, at p. 58:

> Seeing that there was this complete domicil, which almost every writer and speaker upon the subject has regarded as certainly the most important element in considering what the status of married people is, and the status of those divorced from a marriage (this was in its origin a Scotch domicil from the very beginning), the only ground upon which it has been said that a Scotch court could not divorce the parties was that the actual marriage, the contract, was made in England. I do not myself see why upon any principle that should make any difference.

In *Le Mesurier* v. *Le Mesurier* (12), a case about so-called "matrimonial domicil," LORD WATSON, delivering the judgment of the Privy Council, reviewed a large number of authorities, and emphasised the importance of English judges paying attention to the opinions of leading international jurists. He said, at p. 537:

> It is a circumstance not undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favour of a matrimonial domicil, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance that nothing could be extracted from these sources favourable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked. Huber (Lib. 1, tit. 3, sect. 2, *De Confl. Leg.*) states the rule of international law in these terms: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur.*" That passage was cited with approbation by LORD CRANWORTH and LORD WESTBURY in *Shaw* v. *Gould* (11). To the same effect, but in language more pointed, in the text of Rodenburg (*De Stat. Divers.* tit. 1, c. 3, s. 4), cited in the same case by LORD WESTBURY: "*Unicum hoc ipsa rei natura ac necessitas invexit ut cum de statu et conditione hominum quaeritur, uni solummodo Judici, et quidem domicilii, universum in illa jus sit attributum.*"

He added, at p. 538:

> There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application.

In my humble opinion, it is of comparable, if not equal, importance that a person made legitimate from birth in one country should be equally so legitimate in every other country. The existence of the rule that a judgment by a competent court on status has the effect everywhere of a judgment *in rem* is a powerful reason why the powers of limitations, the capacities and incapacities, the rights and liabilities, of that status should *prima facie* be the same everywhere.

In my opinion, the propositions of law resulting from the cases I have cited may be thus expressed: "When a given status has been shown to have been created or recognised by the law of a foreign country, and the mode of its creation is such as our courts can recognise, English law will enforce that status so far as concerns the rights, capacities and obligations of that person, will by proper evidence ascertain its content and consequences, and will apply the proper law of that status accordingly, unless there is some definite prohibition or command of English municipal law, written or unwritten, which constitutes an exception and makes it the duty of the court to refuse, in whole or in part, to recognise or give effect to the status in question." Illustrations of such an exception are afforded by the special rule in regard to the inheritance of English land (*Birtwhistle* v. *Vardill* (6)), or where recognition would be *contra bonos mores*, as in the case of a penal status, such as slavery, and of a marriage which is incestuous or polygamous, and contrary to Christian morality, or where an Act of our Parliament has expressly directed that, in certain circumstances, our courts shall modify the law of the status, or use some defined measure of discretion in applying it. An instance of the last exception is afforded by the effect of the Guardianship of Infants Act, 1925, upon the status of a foreign guardian: see *Re B—'s Settlements* (23), where Morton, J., treated the complete recognition in English law of the status of a guardian duly constituted by foreign law as modified by the following statutory command in sect. 1 of that Act:

> . . . in any proceeding . . . [where] the custody . . . of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . .

In consequence of that sovereign command, he held that the principle of complete recognition in English law of such a guardian's status (which had been explicitly affirmed by Sir William Page Wood, V.-C., in *Nugent* v. *Vetzera* (24), at p. 712), was to that extent modified, and he accordingly exercised a measure of discretion.

If there be such a general principle of universality in the law of status, it follows in the present case that, unless there be some particular and positive prohibition or exception of English municipal law applying to such a legitimation as was effected by the father under his statutory powers, the status of complete legitimacy which resulted in California must be recognised in England, with all its attributes. The old common law rule that the stain of bastardy is indelible cannot in principle constitute such an excepted case, nor did it in the decisions which I have cited, or in *Re Goodman's Trusts* (7). So to treat it would indeed be to visit the sins of the fathers upon the children to the third and fourth generation without legal justification. It follows, in my opinion, that the decision of Farwell, J., was right, unless the particular ground stated in my colleagues' judgment constitutes a valid exception to it. For that, they rely on the English decisions and on certain expressions of opinion by Lord Hatherley, L.C., in *Udny* v. *Udny* (2). *Re Wright's Trust* (1) is the first, and was a case decided by Sir William Page Wood, V.-C. There all the requisites of French law for the legitimation of a child, born illegitimate, by the subsequent marriage of his parents were present to produce in France the status of legitimacy, but at the time of the birth the father was still domiciled in England, and SIR WILLIAM PAGE WOOD, V.-C., held that that fact was in English law fatal to the recognition of the legitimacy under French law, and rejected the claim to succeed, even to personalty, on the ground that the claimant was not a " child " of A the father under a trust of the grandfather's will. His first reason for so deciding was that he thought the doctrine of legitimation by subsequent marriage was based on the old fiction of the Roman law that the marriage could be treated as evidence of a contract to marry, entered into at the time of the connection of which the child was the fruit (p. 604). He B added, at p. 605 :

> . . . it is very important again to go back to the theory, that it [the French rule] must rest upon contract in some way or other . . . [and] that shows that the [French] law must depend wholly upon the theory of a contract.

His second reason was the English legal maxim of the indelibility of C bastardy, for he recognised the general rule that the status of legitimacy, once conferred by the operation of the law of the father's domicil, becomes universal (p. 610), and I think he saw in the maxim a way out of a decision which seemed to him wrong. The grounds for his decision are, perhaps, contained in the following two sentences, at p. 612 :

> D On every point of principle, the law of the father's domicil having fastened on the child, I am driven to this dilemma : If the child be legitimate it is the child of one who, at its birth, was a domiciled Englishman ; but if that is admitted, and it is conceded that the child was born before marriage, it must be illegitimate, for it has no father by the English law, and nothing can afterwards establish any relationship between the putative father and the child. Again, placing the legitimacy on the foundation of a contract at the conception, the French lawyers hold, that if there is any obstacle at the time of the conception of the child it can never be made E legitimate ; and as a contract that the child should be afterwards rendered legitimate by marriage, could not be entered into by a domiciled Englishman, the child must necessarily be illegitimate, and must belong to the mother, and it would be immaterial that she was ignorant of that legal obstacle.

In the penultimate paragraph of his judgment, SIR W. PAGE WOOD, V.-C., F appears to have been greatly impressed by the argument *ab inconvenienti*. That inconvenience may result from conflict of laws is indisputable, but there are two answers to this argument—namely, (i) that it is to the general convenience of mankind that the same status, and the " proper " law of the status, should prevail everywhere, and (ii) that the ethical G consideration of not punishing the innocent ought to weigh in the balance against the objection based on inconvenience. Why should the child born illegitimate suffer for his father's sins ? Why if the law, written or unwritten, ordains that he shall *ex post facto* become legitimate, should he be doing his brothers and sisters of the half-blood a moral injury H by sharing with them in his father's fortune, any more than in the case where they have to accept that fate through a lawful and fertile second marriage of their father ? If we look at it from their side, and consider their conscience, surely their moral duty to the half-blood is just as bounden—and just as convenient, in the true sense of that word —as it is to the whole blood. However, leaving on one side these arguments against the extension of that peculiar exception to other forms of legitimation, it is worth noting that in all cases of legitimation by subsequent marriage there is necessarily one feature which distinguishes them from all other legal forms or methods of legitimation. The juridical origin of the doctrine may be the Roman law, or the civil or canon law, as it probably was in France, and possibly in Scotland, but it seems to be universally recognised, in countries where that doctrine obtains, that the subsequent marriage entails, so to speak, a social recognition of the original cohabitation. If that postulate be accepted as the first premise, the further step may not in those cases be wholly illogical—namely, that of requiring that the father's status should have been the same at both dates. Fortunately, however, law does not depend wholly on logic, as LORD HALSBURY said in *Quinn* v. *Leathem* (25), at p. 506.

In *Udny* v. *Udny* (2), the only questions in issue were about domicil. They were questions as to the abandonment of the domicil of origin, the acquisition of a domicil of choice, and the reviver of the domicil of origin. It is true that LORD HATHERLEY, L.C., expressed views, at pp. 447, 448, as to the necessity of the Scottish domicil at the time of the birth as well as at the time of the marriage, and said that he "saw no reason to retract his opinion," which he had expressed, as SIR WILLIAM PAGE WOOD, V.-C., in *Re Wright's Trust* (1), but, however weighty his later affirmation of opinion is, it was not necessary to the decision of the case, and the appeal was a Scottish appeal. The question whether for legitimation by subsequent marriage under foreign law it is a requisite of private international law as administered in England that the father should have had the foreign domicil at the time of the birth did not arise at all in *Re Goodman's Trusts* (7), as the same domicil obtained at both dates. It did arise, however, in *Re Grove, Vaucher* v. *Treasury Solicitor* (3), and COTTON, L.J., at pp. 232, 233, purported to follow and apply the passage in the opinion of LORD HATHERLEY, L.C., in *Udny* v. *Udny* (2), to which I have just referred. The result of the case has already been stated in my colleagues' judgment, and, so far as that mode of legitimation is concerned, *Re Grove, Vaucher* v. *Treasury Solicitor* (3) is binding on this court, unless its authority has been undermined since by superior judical authority. The question whether or not what has been said upon the law of status in the House of Lords in subsequent cases—for example, in *Salvesen's* case (10)—has weakened the decision in *Re Grove, Vaucher* v. *Treasury Solicitor* (3), I do not propose to discuss, for I humbly conceive that the material considerations affecting the doctrine of legitimation by subsequent marriage are widely, if not wholly, different from those affecting an act of legitimation by a father in the country of his domicil pursuant to a local statute. In connection with the views of LORD HATHERLEY, L.C., about status in private international law—it is a curious fact that, having decided *Re Wright's Trust* (1) in 1856, as SIR WILLIAM PAGE WOOD, V.-C., he had before him in 1863, *Boyes* v. *Bedale* (26), a claim of a natural son to succeed to personalty under a grandfather's will, in which he refused to apply the principle of legitimation by subsequent marriage, in spite of the father having had a French domicil both at the time of the marriage and at the earlier date of the birth. This decision was overruled in *Re Goodman's Trusts* (7), by COTTON, L.J., at p. 296: see the comments in FOOTE ON PRIVATE INTERNATIONAL LAW, 5th Edn., p. 118. There is no trace in A the judgment of SIR WILLIAM PAGE WOOD, V.-C., in *Re Wright's Trust* (1) of the metaphysical view expressed by COTTON, L.J., in *Re Grove, Vaucher* v. *Treasury Solicitor* (3), at p. 232:

> What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to B the child the capacity of being made legitimate by a subsequent marriage.

I confess that the very idea of attributing to a newly born child, to a *filius nullius*, a sort of latent capacity for legitimation at the hands of the natural father to whom he is denied any legal relation seems to me an even more absurd legal fiction, and even less convincing, than the C mythical contract of marriage supposed by the canonists to have been entered into at the moment of procreation. I can see no warrant for applying a rule, originating in the special reasons of the doctrine of legitimation by subsequent marriage, and justified by various legal fictions invented to support it, to the simple and straightforward case D of a direct command of legitimation by the statute law of the father's domicil, for I think that a statute which ordains legitimation upon the performance of specified acts or conditions is as mandatory as a *privilegium.* The Californian statute contains no reference whatever, express or implied, to any requirement of domicil at the date of birth. E It is English law alone which can justify my colleagues' view.

Having dealt with the judicial authorities, I now come to the jurists. Although private international law is a branch of English law, their opinions are of great weight, as was pointed out in the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier* (12), from which I have F already quoted.

However, before citing support for my main reasoning, I want to show, from FRASER ON PARENT AND CHILD, how little historical backing there is behind the fictional theory of COTTON, L.J., of an early contract underlying the Scottish law of legitimation by subsequent marriage. G Even if in that one kind of legitimation it is too late for the Court of Appeal to question the requirement of the father's domicil at the child's birth as a rule of English municipal law, the absence in Scottish history of any real justification for the theory affords additional ground for not extending that rule to any other kind of legitimation. FRASER ON H PARENT AND CHILD, 3rd Edn., p. 39, states as follows:

> The canonist commentators based the law . . . upon a fiction . . . Assuming it to be a general rule, that children are not legitimate unless born in lawful wedlock, they declared the principle to be, that the parents were *fictione juris* married at the birth of the child; and by this fiction they avoided the necessity for violating a general rule. The point was elaborately discussed in a late case; and the decision of the court rejected the fiction, holding the law to be based solely on views of expediency. In a previous case, [*Ross* v. *Ross* (1826), 5 S. 605, at p. 646] LORD

GILLIES had well observed : "The legal fiction is not the foundation of the rule. The rule is founded on principles of justice or expediency ; and the fiction is resorted to merely to explain and reconcile it to the principles or notions of the lawyers of the time."

Later, it is stated, at p. 40 :

> The legitimation of previous offspring is not a matter for which the father and mother could contract or stipulate, or which can be given or withheld according to A what may be proved or inferred as to their purposes or understanding. It is, on the contrary, the gift or legal result of the law, as applicable to certain facts and circumstances ; the value and effect of which must be judged of by the law alone, independent altogether of the intentions or expectations of the parties.

For my main thesis, I begin with the passages from Huber and Rodenburg, which I have already cited from the opinion of LORD WATSON B in *Le Mesurier* v. *Le Mesurier* (12). They treat the status of the person as the source of his personal law, and domicil they regard merely as the factor which brings into operation the local law which creates the status. The great importance of their opinion, however, is that they affirm the general rule that, once the status is established in the country of the C domicil, it is to be accepted in every other country.

SAVIGNY ON CONFLICT OF LAWS, 2nd Edn., p. 302, translated and edited by W. Guthrie, of the Scots bar, under the heading of "Paternal Power," expresses the opinion, quite categorically, that legitimation by subsequent marriage is regulated according to the father's domicil at D the time of the marriage only, and that it does not matter what his domicil was at the time of the birth of the child. He rejects the views that the pre-marriage child can, before the subsequent marriage, have any rights, potential or actual, in relation to his father. It is the father's voluntary recognition at the time of the marriage which alone creates E a relationship and confers the legitimacy.

Professor Lafleur, Professor of International Law at McGill University and a Quebec lawyer, in LAFLEUR ON CONFLICT OF LAWS, 1898, pp. 78, 79, cites this passage of SAVIGNY ON CONFLICT OF LAWS, and adds, at p. 79 :

> This view appears to be founded on sound reasoning and should, it is submitted, F be adopted by our courts.

L. VON BAR ON INTERNATIONAL LAW (2nd Edn., in English, 1892, Edinburgh), of whom Sir Robert Phillimore had a high opinion (see PHILLIMORE ON PRIVATE INTERNATIONAL LAW, 3rd Edn., sect. 385), takes the same view as Savigny, and states, at p. 434 : G

> Legitimation of bastards, either by subsequent marriage or by an Act of the government (*rescriptum principis*), is nothing but a legal equalisation of certain children, illegitimately begotten, with legitimate children. The law which rules the rights of legitimate children must therefore regulate the legitimation of bastards ; and as the former are subject to the actual personal law of the father, the latter must be determined also by the personal law of the father at the date when the fact said H to infer legitimation took place. If, then, there is a question of legitimation *per subsequens matrimonium*, the child is legitimate, if that is the result of the personal law which the father enjoyed at the time of the marriage. This is now the prevailing view.

The phrase "legal equalisation" goes to the very root of the problem of the retrospective effect of legitimation raised by this appeal.

WESTLAKE ON INTERNATIONAL LAW, 4th Edn., shares the views of Savigny, Lafleur and Bar that for legitimation by subsequent marriage the only requisite is the domicil of the father at the date of the marriage (sects. 54, 55). He construes the opinion of LORD BROUGHAM in *Dalhousie* (*Countess*) v. *M'Douall* (20) and *Munro* v. *Munro* (4), on A which I have already commented, as plainly implying that the father's domicil at the date of the birth is immaterial. In sect. 247, he adds this principle, which is indeed implicit in the new relationship of father and dependent infant:

> If and as soon as a child born out of wedlock is legitimated, being a minor, the B domicil of its father at the time of such legitimation becomes its domicil.

PHILLIMORE ON PRIVATE INTERNATIONAL LAW, 1st Edn., Chapter XVII, sect. 371, took the view of the law of status which I have been expressing:

> The position, however, already stated—namely, that the law of the domicil determines the status, and therefore, travels with the person, binding on him all its C capacities and incapacities, wherever he goes—rests, as an abstract proposition, upon a very largely preponderating authority of jurists—upon the recognition of it by courts of justice—and has, moreover, been expressly incorporated into the positive legislation of the principal states on the European continent.

The section is reprinted in the same words in the third edition, 1889, edited by Sir Walter Phillimore. Neighbouring sections touch on D nationality as an alternative to domicil in Continental law, but in 1861 the clear demarcation between the two bases of status was perhaps not realised. In sect. 542, whilst conceding that legitimation occurring by the authority of the state " evidenced by some public act, as in England by an Act of Parliament, or in other countries by the decree of the E sovereign (*per rescriptum principis*), might give rise to an international question of some nicety," the author adds:

> . . . though reason and principle are in favour of the recognition by other countries of such legitimation, where it is valid *lege domicilii*.

He then cites the opinion of Schaffner:

> F . . . that the *legitimato per rescriptum principis* is good and valid everywhere, if good and valid by the law of the domicil, and that the *lex loci rei citae* has no bearing (even in case of realty) upon the question, which is one purely of status.

STORY ON CONFLICT OF LAWS, 1st Edn., was published in 1834. The second edition was published in Jan., 1841, and the third was published in 1846. He discussed the English and Scottish cases connected with G legitimation by subsequent marriage in the second edition, but had not then seen the judgments in the House of Lords. These he discussed in the third edition, the last edited by himself. I quote from the eighth edition, edited by Bigelow in 1883. At the outset of chapter IV, on " Capacity of Persons " (sect. 51 on " personal laws "), the great lawyer H summarises the opinions of foreign jurists on the international law of status in terms which support the three general principles expressed about status in this judgment—namely, (i) it arises by the law of the country of the domicil, (ii) once established there, it extends to every other country; and (iii) it is the same everywhere, and says, at pp. 67, 68:

> All laws which have for their principal object the regulation of the capacity

> state, and condition of persons, have been treated by foreign jurists generally as personal laws. They are by them divided into two sorts; those which are universal, and those which are special. The former (universal laws) regulate universally the capacity, state, and condition of persons, such as their minority, majority, emancipation, and power of administration of their own affairs. The latter (special laws) create an ability or a disability to do certain acts, leaving the party in all other respects with his general capacity or incapacity. But whether laws purely personal belong to the one class or to the other, they are for the most part held by foreign jurists to be of absolute obligation everywhere, when they have once attached upon the person by the law of his domicil. Boullenois has stated the doctrine among his general principles. Personal laws, says he, affect the person with a quality which is inherent in him, and his person is the same everywhere, Laws purely personal, whether universal or particular, extend themselves everywhere; that is to say, a man is everywhere deemed in the same state, whether universal or particular, by which he is affected by the law of his domicil.

Amongst other earlier jurists, he cites the very passage from Rodenburg which Lord Watson quoted in *Le Mesurier* v. *Le Mesurier* (12), already cited by me. The whole section is relevant to the present appeal, and especially to the cleavage of opinion between my colleagues and myself. There follows in the chapter an elaborate discussion and analysis of the writings of very many jurists on various aspects of the law of personal capacity, which points out the many disagreements which appear. In the end, I think his own opinion remains that which he expresses in sect. 51. He discusses legitimation by subsequent marriage in a series of many sections, from sect. 93 to sect. 93v. In sect. 93m, he says [p. 124]:

> The weight of foreign authority would therefore, on the whole, seem decidedly to preponderate in favour of the rule that an illegitimate person, who by the subsequent marriage of his parents becomes legitimated as heir by the law of his domicil, ought to be deemed such as to the inheritance of land in all other countries, at least where it is not expressly prohibited by the terms of the local law that such a person, born before marriage, should inherit.

He states his general conclusions on status in sects. 98-106. In sect. 98, whilst implicitly recognising the complete sovereignty of each nation, he sums up his own views thus:

> The proper conclusion, then, to be drawn from this review of the subject is, that the rule of Huberus is correct, that no nation is under any obligation to give effect to the laws of any other nation which are prejudicial to itself, or to its own citizens; that in all cases every nation must judge for itself what foreign laws are so prejudicial or not; and that, in cases not so prejudicial, a spirit of comity and a sense of mutual utility ought to induce every nation to allow full force and effect to the laws of every other nation.

Sect. 101, which is directly in point in this appeal, as it bears on the act of legitimation by the father in California, the country of his domicil, is as follows:

> Acts in the country of domicil. First: The capacity, state, and condition of persons according to the law of their domicil will generally be regarded as to acts done, rights acquired, and contracts made in the place of their domicil, touching property situate therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there, they will be held invalid everywhere.

The words "acts done" cover the legitimation of David by his father.

I do not discuss the passages in Dicey cited by my colleagues. The question is whether his tentative views of the result of English decisions

are well-founded. It is well to bear in mind the historical stage in the growth of private international law at which STORY wrote. Jurists were still confusing their statements of first principles by failing to realise that the secondary qualifications and exceptions, which the laws of particular countries made inevitable, could not be expressed as part
A of the primary propositions themselves in which the principles were formulated. Indeed, there was still confusion of thought as to which were first principles and which exceptions, and as to which were causes and which were consequences, and judicial pronouncements in England and Scotland were not always free from confusion. DICEY'S analysis of
B English decisions in the form of rules and exceptions—often tentative because the ground was not covered, or because doubts remained—was not even to begin till 1879, when he published DICEY ON DOMICIL. If the preponderant opinion of all the jurists down to 1846 was what STORY'S researches led him to think, it follows that, in their view, and in
C his view, the complete legitimacy conferred on David by Californian law would "extend to England and be the same" here as there, unless the application of the primary law of status were shown to be prevented by some definite prohibition or other exception of English municipal law, clearly established. No such prohibition or exception can, in my
D opinion, be found in the peculiar rule, developed in *Re Wright's Trust* (1) and in *Re Grove, Vaucher* v. *Treasury Solicitor* (3) out of the mist and varying theories of legitimation by subsequent marriage, upon which the father's domicil at the date of the child's birth was held to be a condition precedent to that cause of legitimation, although the rule of
E English heirship to land, laid down in *Birtwhistle* v. *Vardill* (6), does satisfy the requirements of such an exception. Whether the rule in *Re Wright's Trust* (1) and in *Re Grove, Vaucher* v. *Treasury Solicitor* (3) was logical, or whether it was influenced by the ancient belief of lawyers in the indelibility of bastardy, it is not, I think, open to this court to
F discuss, but the reasons for that rule are, in my opinion, too special, and too remote from anything relevant to the Californian statute, to be germane in principle to the present appeal. When to that test of relevance is added the repudiation of the rule by so many leading jurists, on grounds of legal principle and of comity, I think that it is wrong to
G apply it here. I should have dismissed the appeal, but *dis aliter visum*, and it will be allowed.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Stibbard, Gibson & Co.* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the appellants); *Crane & Hawkins* (for the respondent).

H

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

KEEVIL AND KEEVIL, LTD. *v.* BOAG.

[COURT OF APPEAL (Luxmoore and Goddard, L.JJ.), **June 25, 1940.**]

Discovery—Action on marine insurance policy—Ship's papers—When discovery ordered—Discretion of judge—R.S.C., Ord. 31, *rr.* 12, 12A, 14.

Insurance—Marine insurance—Discovery—Order for ship's papers on summons for directions—When order will be made—R.S.C., Ord. 31, *rr.* 12, 12A, 14.

A policy of marine insurance covered 1,600 cases of eggs while in transit from the Argentine to England. When the eggs arrived, it was discovered that 1,000 cases had gone bad from natural causes. Action was brought on the policy to recover the loss, and the underwriters on the summons for directions applied for an order for the ship's papers. The judge refused the order, but added a clause giving liberty to apply for affidavit of ship's papers thereafter, if so advised. The underwriters appealed, and contended for an order for ship's papers in common form, or, alternatively, for an ordinary order for discovery before pleadings:—

HELD: (i) the judge has, under R.S.C., Ord. 31, r. 12A, a complete discretion as to whether or not he will make an order for an affidavit of ship's papers. In this case, the judge had correctly exercised his discretion, and there was no ground for interfering with his decision.

(ii) this was not a case where discovery could be ordered before the pleadings were closed.

[**EDITORIAL NOTE.** Under the old practice, an underwriter sued upon a policy of marine insurance was entitled to have the action stayed pending the production of all the documents and papers relating to the insurance or the subject-matter thereof, and the cargo and freight and the loss. The underwriter was entitled to an order in these terms at any time after appearance, and it was unnecessary to produce any affidavit in support of the application. The practice was altered in 1936 by the addition of r. 12A to R.S.C., Ord. 31. Under this rule, the whole matter of the production of the ship's papers is put within the absolute discretion of the court or judge.

AS TO DISCOVERY OF SHIP'S PAPERS, see HALSBURY, Hailsham Edn., Vol. 18, p. 391, para. 563; and FOR CASES, see DIGEST, Vol. 18, pp. 93-95, Nos. 442-468. See also THE YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 503-505.]

INTERLOCUTORY APPEAL by the defendant from an order of SINGLETON, J., dated June 3, 1940. The action had not reached the stage of pleadings, and the point before the court is clearly set out in the judgment of GODDARD, L.J.

Patrick Devlin for the appellant.

A. J. Hodgson for the respondents.

GODDARD, L.J. [delivering the judgment of the court]: This action, which is in the Commercial List, is brought to recover a loss on a marine policy. On the summons for directions, an application was made by the defendant underwriter for an order for ship's papers. The judge refused that order, but he inserted the following clause in the order:

> Liberty to apply for affidavit of ship's papers hereafter if so advised.

It is against that part of the order that this appeal is brought, and this court is invited to make an order for ship's papers in common form, or, alternatively, to make the ordinary order for discovery before pleadings.

It appears that the action is brought upon a Lloyd's policy under which 1,600 cases of eggs were delivered on Nov. 23, 1939, being shipped from the River Plate to this country. It is a policy which covers the goods, not only during sea transit, but also during their transit from warehouse to warehouse, and, therefore, covers a certain amount of land transit as well. When the eggs arrived, it was discovered on inspection that the eggs in 1,000 cases were bad. They had gone bad through some decay in the egg, known as "spot." It is not a case where they have been smashed, or perished by sea-water, or anything of that sort. They are perishable goods and they have deteriorated through some cause in the egg itself, which might have been brought on or caused by dampness in the ship, or by a variety of other causes.

Before 1936, no doubt, the defendant would have been entitled to an order for ship's papers, and this action would have been stayed under the practice which had grown up since the end of the eighteenth century, which often involved very great hardship to the insured. That hardship would be particularly felt in the present circumstances, because the order for ship's papers is an order of a most comprehensive description. Very often great difficulty was experienced in making proper compliance with the order, which used to lead to many applications and to constant delay in reaching the hearing of a case.

In 1936, the rules relating to this matter were altered. By R.S.C., Ord. 31, r. 12A, a discretion was given to the judge as to whether or not he would order an affidavit of ship's papers. Rule 12A provides as follows:

> Where in any action arising upon a marine insurance policy an application for discovery of documents is made by the insurer, the following provisions shall apply :—(*a*) On the hearing of the application, the court or judge may, subject as is provided in the next paragraph, make an order in accordance with r. 12 or r. 14 of this order.

Rule 12 is the order dealing with discovery and ordering an affidavit to be filed. Rule 14 relates to specific documents. Subrule (*b*) provides as follows:

> Where in any case the court or judge is satisfied, either on the original application or on a subsequent application, that it is necessary or expedient, having regard to the circumstances of the case, to make an order for the production of ship's papers, the court or judge may make such an order in the Form No. 19 in Appendix K.

That is the old form. A discretion is given to the court as to whether or not the order for an affidavit of ship's papers should go. Subrule (*c*) provides as follows:

> In making an order under this rule the court or judge may impose such terms and conditions as to staying proceedings or otherwise as the court or judge in its or his absolute discretion shall think fit.

Obviously, the effect of the rule is to put into the complete discretion of the judge whether or not he should make an order for an affidavit of ship's papers. It gives him power to do exactly as the judge has done in this case—namely, postpone the application, or to say that, if at a later stage it can be shown that it is fair and right that the underwriters should have access to the ship's papers, which are not ordinarily in the possession or power of the consignee of the goods, or shipper of the goods, as the case may be, an application can be made, and no doubt in a proper case it would be granted. However, this is a matter upon which, if the judge has exercised his discretion, this court would be very slow to interfere with it. The court can interfere where the judge has exercised a discretion which the court thinks has been wrongly exercised, as was recently laid down by the House of Lords, but that does not mean that, merely because this court, or any member of the court, might think it would exercise its discretion differently, that is a sufficient ground for interfering with the decision of the judge below.

In this case, if we had been dealing with this case in the first instance, we should have exercised our discretion in exactly the same way. We cannot see any real ground for making the very stringent order for an affidavit of ship's papers in a case of the comparative simplicity of this case. Either these eggs were bad when they were put into the warehouse, or they went bad in the warehouse, or they went bad during transit. Further, we are told in this court something which was not mentioned to the judge. It is a matter which has a great bearing on the case, and I am sure that it would have had a great effect on SINGLETON, J., if it had been mentioned to him. It appears that there is a certificate of quality provided from the proper department of the government of the Argentine Republic, saying that these goods were in a fit condition to be shipped. If that is so, as counsel for the respondents says that the document is admissible in evidence under the Evidence Act, though it is not conclusive, it affords strong *prima facie* evidence, at any rate, that the eggs had deteriorated while on the ship. However, I do not want to say anything which will in any way prejudice or pre-judge the trial of the action.

I think that this is eminently a case which shows how fortunate it is that the rule has been altered. In this case, there can be no hardship or injustice on the underwriter in refusing the order for an affidavit of ship's papers. Indeed, it would be a great hardship if the plaintiffs, whom one must assume are not only the holders of the bills of lading but also interested under the policy, had to comply with the very stringent order which it is sought here to obtain.

Counsel for the appellant has argued that, even if this court does not think fit to reverse the judge and order that an affidavit of ship's papers be filed before the action proceeds, we ought to make an order for discovery before pleadings. In the first place, that is not asked for in the notice of appeal. Though I agree that that would not necessarily be fatal, I do not think that it would be right, in a case of this sort, where this very stringent order has been sought, and where a limited order was made

by the judge, in the sense that he has given them liberty to apply for this affidavit of ship's papers hereafter if so advised, to accede to the application of counsel for the appellant. It would hardly be fair to the respondents to say: "You have to meet a case for discovery at an unusually early stage in the proceedings." Not only owing to the fact that it was
A not asked for in the notice of appeal, but also taking into consideration all the circumstances, we think that we ought not to entertain the application. We think that on principle the same considerations which apply to an affidavit of ship's papers really apply to this other application. There are cases, no doubt, not only in the Commercial Court,
B but also in other courts, where, in exceptional circumstances (and generally they have to be very exceptional circumstances), the court has ordered discovery before the pleadings are closed, but we do not think that this is one of those cases. Therefore, this appeal fails, and must be dismissed, the costs being the plaintiffs' costs in any event.

C *Appeal dismissed with costs.*

Solicitors: *Ballantyne, Clifford & Co.* (for the appellant); *William A. Crump & Son* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

D *Distinguished.* NEATH R.D.C. *v.* WILLIAMS. [1950] 2 All E.R. 625.

Distinguished. MINT *v.* GOOD. [1950] 2 All E.R. 1159.

SEDLEIGH-DENFIELD *v.* O'CALLAGAN AND OTHERS (TRUSTEES FOR ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS).

E [HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **April 18, 22, 23, 24, June 24, 1940.**]

Nuisance—Private nuisance—Created by trespasser—Creation unknown to occupier—Right of stranger to abate—Whether occupier liable for failure to abate.

The respondent college was the owner of property adjoining the
F appellant's premises. The boundary of its property on that side had originally been a ditch and a hedge, their relative positions changing along the boundary. Where the appellant's garden adjoined the college property, the ditch abutted on the garden, the hedge being on the side of the ditch nearer to the college property. It was admitted that, applying the usual presumption, the ditch at this point belonged to the college. About 1934, when a block of flats was erected upon
G the western side of the appellant's premises, the ditch had been piped in by the county council. No permission was obtained from the college, and the fact that these pipes had been put in was not at any material time brought to the notice of the college authorities, but it did become known to the member of the respondent society responsible for cleaning out the ditch, a matter which had been done twice yearly. No proper
H guard was put at the entrance to the pipe to prevent its being blocked by debris. The pipe became blocked, so that the appellant's garden was flooded, and he claimed damages from the college, on the ground that the pipe was a nuisance:—

HELD: as nearly 3 years elapsed before the garden was flooded, and as a person authorised by the respondents was in charge of the ditch and cleaned it out on their behalf twice a year, the respondents were liable, because, with knowledge or means of knowledge, they suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement. The respondents had adopted the nuisance by continuing to use the artificial contrivance of the conduit for getting rid of water from their property without taking the proper means for rendering it safe.

Decision of Court of Appeal ([1939] 1 All E.R. 725) *reversed.*
Job Edwards, Ltd. v. *Birmingham Navigations* (10) *overruled.*

[**EDITORIAL NOTE.** It is not quite clear whether the Court of Appeal in this case would have come to the opposite conclusion but for the authority of *Job Edwards, Ltd.* v. *Birmingham Navigations.* That court was, of course, bound by that case, unless its facts could be distinguished from the present. The House of Lords, however, has now overruled the decision in that case and has approved the dissenting judgment of Scrutton, L.J. In the circumstances of the present case, it is held that the respondent society ought to have known of the existence of the nuisance and taken measures to remove its cause. The Court of Appeal stated that it was not the duty of an occupier to go about his land searching for nuisances which may or may not exist, but, after the decision in this case, it is clear that, to be safe, he must from time to time make inquiry of his servants whether any stranger has done anything on his land that may cause a nuisance.

As to Continuing a Nuisance, see HALSBURY, Hailsham Edn., Vol. 24, pp. 84, 85, para. 148; and for Cases, see DIGEST, Vol. 36, p. 214, Nos. 567-575.]

Cases referred to:

(1) *Nitro-Phosphate & Odam's Chemical Manure Co.* v. *London & St. Katharine Docks Co.* (1878), 9 Ch.D. 503; 36 Digest 101, *671*; 39 L.T. 433.

(2) *Greenock Corpn.* v. *Caledonian Ry. Co.*, *Greenock Corpn.* v. *Glasgow & South Western Ry. Co.*, [1917] A.C. 556; 36 Digest 104, *700*; 86 L.J.P.C. 185; 117 L.T. 483.

(3) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

(4) *Rickards* v. *Lothian*, [1913] A.C. 263; 36 Digest 194, *353*; 82 L.J.P.C. 42; 108 L.T. 225.

(5) *Fletcher* v. *Smith* (1877), 2 App. Cas. 781; 44 Digest 22, *135*; *sub nom. Smith* v. *Musgrave*, 47 L.J.Q.B. 4; *sub nom. Musgrave* v. *Smith*, 37 L.T. 367.

(6) *Broder* v. *Saillard* (1876), 2 Ch.D. 692; 36 Digest 190, *321*; 45 L.J.Ch. 414.

(7) *Hurdman* v. *North Eastern Ry. Co.* (1878), 3 C.P.D. 168; 36 Digest 191, *325*; 47 L.J.Q.B. 368; 38 L.T. 339.

(8) *Buckley (R. H.) & Sons, Ltd.* v. *Buckley (N.) & Sons*, [1898] 2 Q.B. 608; 19 Digest 161, *1118*; 67 L.J.Q.B. 953.

(9) *Saxby* v. *Manchester & Sheffield Ry. Co.* (1869), L.R. 4 C.P. 198; 36 Digest 214, *572*; 38 L.J.C.P. 153; 19 L.T. 640.

(10) *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341; 36 Digest 214, *575*; 93 L.J.K.B. 261; 130 L.T. 522.

(11) *Barker* v. *Herbert*, [1911] 2 K.B. 633; 36 Digest 197, *374*; 80 L.J.K.B. 1329; 105 L.T. 349.

(12) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560; 36 Digest 177, *221*; 66 L.J.Ch. 275; 76 L.T. 174.

(13) *Humphries* v. *Cousins* (1877), 2 C.P.D. 239; 36 Digest 190, *322*; 46 L.J.Q.B. 438; 36 L.T. 180; *on appeal*, 46 L.J.Q.B. at p. 442.

(14) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H.L.Cas. 642; 36 Digest 169, *115*; 35 L.J.Q.B. 66; 12 L.T. 776; *affg.* (1864), 4 B. & S. 616.

(15) *Penruddock's Case* (1598), 5 Co. Rep. 100 b; 36 Digest 205, *470*.

(16) *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K.B. 551; Digest Supp.; 103 L.J.K.B. 321; 148 L.T. 287.

(17) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 36 Digest 164, *65*; 64 L.J.Ch. 759; 73 L.T. 353.

(18) *Colls* v. *Home & Colonial Stores, Ltd.*, [1904] A.C. 179; 19 Digest 123, *830*; 73 L.J.Ch. 484; 90 L.T. 687; *revsg.*, [1902] 1 Ch. 302.

(19) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 26 Digest 433, *1519*; 45 L.J.Q.B. 260; 34 L.T. 97.

(20) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 19 Digest 7, *4*; *sub nom. Public Works Comrs.* v. *Angus & Co., Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844; *affg.* (1878), 4 Q.B.D. 162.

(21) *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 36 Digest 99, *658*; 45 L.J.Q.B. 446; 35 L.T. 321.

(22) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1; Digest Supp.

(23) *Wilkins* v. *Leighton*, [1932] 2 Ch. 106; Digest Supp.; 101 L.J.Ch. 385; 147 L.T. 495.

(24) *R.* v. *Watts* (1703), 1 Salk. 357; 26 Digest 433, *1517*.

(25) *Baten's Case* (1610), 9 Co. Rep. 53 b; 36 Digest 202, *435*.

(26) *Lemmon* v. *Webb*, [1895] A.C. 1; 36 Digest 205, *472*; 64 L.J.Ch. 205; 71 L.T. 647; *on appeal from*, [1894] 3 Ch. 1.

(27) *Smith* v. *Giddy*, [1904] 2 K.B. 448; 2 Digest 64, *407*; 73 L.J.K.B. 894; 91 L.T. 296.

(28) *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing & Finishing Co.*, [1927] A.C. 226; 36 Digest 219, *613*; 96 L.J.P.C. 25; 136 L.T. 417.

APPEAL from an order of the Court of Appeal (SCOTT, MACKINNON and GODDARD, L.JJ.), dated Feb. 23, 1939, and reported [1939] 1 All E.R. 725, affirming an order of BRANSON, J., dated June 22, 1938, and reported [1938] 3 All E.R. 321. The facts and the arguments are fully set out in the opinions of their Lordships.

G. Granville Sharp, *H. V. Lloyd-Jones* and *G. Avgherinos* for the appellant.

Richard O'Sullivan, K.C., and *Ifor Lloyd* (for *Hubert Hull* on war service) for the respondents.

VISCOUNT MAUGHAM: My Lords, this is an appeal from an order of the Court of Appeal affirming the decision of BRANSON, J., which dismissed with costs the action of the plaintiff, who is the appellant on this appeal. The respondents (the defendants) are the trustees of the St. Joseph's Society for Foreign Missions.

The facts are very clearly stated in the judgment of the Court of Appeal delivered by MACKINNON, L.J., and substantially they are as follows. The appellant is the owner and occupier of a house and garden, 1, Victoria Road, Mill Hill. To the north of his plot of land is a field which is owned by the respondents. On the southern edge of that field is a hedge, and to the south of the hedge there is a ditch. There was evidence that periodically this ditch had been cleaned out by the respondents' servants or helpers. Upon this, and upon the presumption that the area of a ditch alongside a hedge belongs to the owner of the hedge, there was ground for inferring that the area of the ditch was the property of the respondents, though no other evidence of their title was given. The trial judge dealt with the case on the basis that the area of the ditch was owned by the respondents. The Court of Appeal took the same view, and, in the absence of evidence to the contrary, I think that it is clear that we must come to the same conclusion.

To the west of the appellant's plot of land was another plot on which stands a block of flats called Holcomb Court. Before 1934, the ditch, as an open watercourse, flowing from east to west, continued along the A northern edge of Holcomb Court to a roadway called Lawrence Street, running from north to south on the western side of Holcomb Court. In 1934, the then owner of Holcomb Court made an agreement with the Middlesex County Council under which the latter undertook to substitute a pipe or culvert, 15 ins. in diameter, in the line of the ditch B along the north side of Holcomb Court. She had no right to do that, as the ditch was not her property, but was the property of the respondents. The county council, however, did the work, made the culvert, and covered the top of it with earth. At the western end, the culvert was connected with a manhole and sewer in Lawrence Street. The eastern C end of the culvert was carried to a point about 2 ft. to the east of the fence dividing the appellant's plot from the Holcomb Court plot. To prevent the possibility of wood, leaves or other refuse carried down by the stream blocking the opening of the 15-ins. pipe, it would have been proper practice to fix a grid or grating in the ditch a little to the D east of the opening of the pipe, since there are a number of trees in the hedge, and sticks and leaves would be apt to fall into the ditch. Moreover, the county council recognised the necessity for a grating, and provided one, but their workman, instead of fixing it in the ditch some 2 ft. from the opening of the pipe or culvert, where it would intercept E leaves and other refuse, placed it on the top of the culvert, where it was completely useless. The mouth of the culvert is on land belonging to the respondents.

This state of things continued till Apr., 1937, the respondents' helpers or servants continuing periodically to clean out the ditch. On Apr. 20, F 1937, a heavy storm of rain occurred, the culvert became blocked with refuse, and the appellant's premises were consequently flooded by the water coming down the ditch which could not get away down the 15-ins. pipe. The appellant suffered substantial damage. Expert evidence was given on behalf of the appellant that a grating or grid placed properly G in the ditch at a proper distance from the culvert would have intercepted debris, rubbish or foreign matter in the ditch and would have prevented such a blockage or stoppage of the flow of water as caused the ditch to overflow. This evidence was accepted by the judge, who came to the conclusion, as I understand his judgment, that the ditch alongside the H appellant's premises and running to the 15-ins. culvert, unprotected as the mouth of the culvert was by any grid or grating, was of the nature of a nuisance, giving to the appellant, on damage being caused by the nuisance, a *prima facie* right to recover damages. The Court of Appeal agreed.

Two points should here be mentioned. The first is that the respondents did not set up as a defence that the rainfall, admittedly a very heavy one, was so exceptional in amount that no reasonable man could have anticipated it, or that it amounted to an act of God: see as to such a defence *Nitro-Phosphate & Odam's Chemical Manure Co.* v. *London &*
A *St. Katharine Docks Co.* (1) and *Greenock Corpn.* v. *Caledonian Ry. Co.* (2). The second point, which was raised as a defence, was that the respondents never consented to the making of the culvert as a substitute for a part of the ditch, and were ignorant of its existence. It was, however, admitted by a witness for the respondents, one Brother Dekker,
B who, at the time when the work was done, was the person responsible for cleaning the ditch, that he saw the work in progress at the time, and that he assumed that it was being done with the consent of the respondents, but did not report the matter to his superior. BRANSON, J., accepted the contention that the respondents did not become aware of
C the construction of the culvert (with its unguarded entrance) until after the flood of Apr. 20, 1937. There is no doubt that the placing of the culvert was an act of trespass, and that, in the circumstances, the respondents might not have become aware of it for some time after the work was completed. However, nearly 3 years elapsed before the flood
D of Apr., 1937, and Brother Dekker or some other person was in charge of the ditch, and cleaned it out on behalf of the respondents twice a year. It was an agricultural ditch, of which the purpose was to act as a land drain and to take away surplus water from the adjoining fields of the respondents. An owner or an occupier of land constantly leaves
E such a matter as the cleaning out of ditches and drains on his land to persons employed by him to look after such things, and he would generally not expect, nor would he receive, detailed reports in regard to them. The culvert-opening and the ditch were perfectly open to view for most of the time. In these circumstances, I have formed the
F opinion, in which I think all your Lordships agree, that, before the flood of Apr., 1937, the respondents must be taken to have had knowledge of the existence of the unguarded culvert which for nearly 3 years had been the means by which the water coming down the ditch on the respondents' land had flowed away to the sewer in Lawrence Street.
G All that is necessary in such a case is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows of it, or must be taken to know of it. An absentee owner, or an occupier oblivious of what is happening under his eyes, is in no better position than the man who looks after his property, including such
H necessary adjuncts to it, in such a case as we are considering, as its hedges and ditches.

On this view as to the knowledge, or presumed knowledge, of the respondents, the first question is as to their legal position in relation to the appellant. To put the matter more precisely, were they under a *prima facie* liability as regards the appellant if the ditch overflowed owing to the culvert becoming blocked, with the result that the appellant's land suffered from an overflow of water from the ditch ? The appellant contends that the respondents are liable for a private nuisance for which they are responsible. My Lords, I look upon the word nuisance as used in our law as a generic term. It is applied to damage resulting from water, smoke, smell, fumes, gas, noise, heat, electricity, disease-germs, trees, vegetation, and animals, as well as to other matters, and very little thought is sufficient to show that the ways in which damage from these things is caused and may be prevented are widely different. In my opinion, the legal duty of the owner of land towards an adjoining owner may be very different in some of these cases, and may depend on very different considerations. In the present case, we are dealing with the escape of water from an artificial watercourse on the respondents' land. The upper part of this watercourse consisted of an open ditch proved to have been nearly 3 ft. 4 ins. deep and 1 ft. 8 ins. wide, capable without overflowing of carrying a considerable quantity of water if unobstructed. At its lower end, however, as I have stated, it led through a brick contrivance into a culvert 15 ins. in diameter. It was not provided with any such grid as I have described, and the culvert was accordingly liable to be blocked up. In such a case, apart from a special defence which I will consider later, there is ample authority that the respondents are liable as for a nuisance in case of the flooding of the appellant's premises.

My Lords, I will begin by saying that, in my opinion, the principle laid down in *Rylands* v. *Fletcher* (3) does not apply to the present case. That principle relates only to cases where there has been some special use of property bringing with it increased danger to others, and does not extend to damage caused to adjoining owners as the result of the ordinary use of the land : *Rickards* v. *Lothian* (4), at p. 280. On the other hand, there is no doubt that, if an owner of land for his own convenience diverts, or interferes with, the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow to his neighbours' land, or that he will *prima facie* be liable if such an overflow should take place : *Fletcher* v. *Smith* (5), as to which see *Greenock Corpn.* v. *Caledonian Ry. Co.* (2). It would be a defence to prove that the overflow was due to a rainfall or a storm so exceptional that it should be regarded as an act of God. No doubt it would also be a defence, subject to a qualification which I will mention later, to prove that the overflow was caused by the interference of a trespasser. The distinction between a natural use of land, or of water flowing through it, and the consequences of constructing some artificial work on land which alters the flow of water and causes damage to a neighbour has been drawn in a number of cases. The principle is not limited to the case of the diversion of a natural stream. I will cite three cases in support of that proposition, though, in my view, the present case does not differ from one in which a natural stream is inter-

fered with. The first is *Broder* v. *Saillard* (6), a decision by SIR GEORGE JESSEL, M.R. The plaintiff and the defendant were adjoining occupiers, and the defendant's predecessor had erected a stable on a mound of earth heaped to a considerable height in close proximity to the plaintiff's house, which caused the damp to percolate through the wall of that
A house and so to cause damage to it. It was held that the lessee in possession of the house where the artificial work was situate must be held responsible for the nuisance occasioned by the existence of that artificial work. The second case is *Hurdman* v. *North Eastern Ry. Co.* (7), a decision of BRAMWELL, BRETT and COTTON, L.JJ., delivered
B by COTTON, L.J. Again it was a case of a heap or mound of earth raised by the defendant on his land causing rainwater falling on that land to make its way into the adjoining house of the plaintiff. The decision in *Broder* v. *Saillard* (6) was followed. The principle was stated as follows, at p. 173:

> C . . . if anyone by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured . . .

The proposition was limited to liability for allowing things in themselves likely to be offensive to pass into a neighbour's property, and
D interference with his lights (not being ancient) was expressly excluded. The third case is that of *Buckley (R. H.) & Sons, Ltd.* v. *Buckley (N.) & Sons* (8), which was also a decision of the Court of Appeal, consisting of A. L. SMITH, RIGBY and VAUGHAN WILLIAMS, L.JJ. The facts are a little complicated, but, for the present purpose, it is sufficient to say
E that a previous owner of land on the bank of a river had, for the purpose of bringing water from the river to a mill belonging to him, constructed a goit or water-channel with a shuttle at the head of it to control the flow of water from the river. The shuttle was allowed by one of the predecessors in title of the defendants to get out of repair, and a flood
F in the river carried away the shuttle and thus flooded the plaintiff's lands and caused damage. It was held that the existing owners of the land on which the shuttle was situate were *prima facie* bound not to allow the goit and shuttle to get into a dangerous state, but must keep them in repair so as to prevent damage to the owners of the adjoining
G lands.

The main defence of the respondents in this case was that the erection of the culvert, with its lack of any proper contrivance for preventing it from becoming blocked with leaves and refuse, was an act of trespass by the Middlesex County Council without the permission or knowledge
H of the respondents, and that they were, therefore, free from liability. This defence requires careful consideration. It is said to derive support from *Saxby* v. *Manchester & Sheffield Ry. Co.* (9) and *Job Edwards, Ltd.* v. *Birmingham Navigations* (10). The facts in both these cases are difficult fully to appreciate without a very careful study of the reports, and I do not like to take up your Lordships' time by an elaborate analysis

of those facts. In *Saxby's* case (9), we have the advantage of a statement of the 3 counts of the declaration, and in each of the 3 counts it is pleaded that the defendants obstructed and diverted the water in a certain watercourse to the plaintiff's damage. No such obstruction by the defendants was proved, and on this ground CHANNELL, B., on assize, directed a non-suit. In the Court of Common Pleas, however, the plaintiffs obtained a rule *nisi* for a new trial on the ground of misdirection, and the report deals with the argument on this question. The question of nuisance was argued at length, but counsel for the defendants concluded by saying, at p. 201, that nothing short of evidence of an active obstruction of the stream by the defendants would sustain the declaration. The judgments as reported do not proceed on quite the same lines. BOVILL, C.J., said, at p. 203, that the obstruction was not an act done by the defendants, or by anyone authorised by them, nor was it an act done for their benefit or "adopted by them." He went on to show that, in his view, the defendants were not responsible for its continuance, and he concluded by holding that there was no evidence which could have warranted a verdict for the plaintiff. BYLES, J., apparently took the same view. The other two judges, KEATING and MONTAGUE SMITH, JJ., however, were, as I think, rather more cautious. They said that there was no evidence of a wrongful continuance by the defendants of a nuisance detrimental to a neighbour, and that on that ground there was nothing to render them liable in the action. It is impossible to regard this case as an authority for holding that, if a nuisance is created by a trespasser's act, the occupier of the land is necessarily free from liability if damage is caused to an adjoining owner. On the contrary, I think that it suggests that, if the occupier "adopts" or "continues" the nuisance, he will be liable if damage is caused. This is the view taken of the decision in *Barker* v. *Herbert* (11). That was a case where the defendant was the owner in possession of a vacant house in a street with an area adjoining the highway. One of the rails of the area railing had been broken away by some boys, and there was, therefore, a gap in the railings. A child got through it, and, while climbing along inside the railings, fell into the area and sustained injuries. The defendant had no knowledge of the removal of the rail, which had taken place only 3 days before the accident, and he did not reside in the house. The case was tried with a jury, who answered a number of questions, upon the answers to which the action was dismissed. The Court of Appeal agreed with this result. The case was treated as an action for nuisance. *Saxby's* case (9) was cited. VAUGHAN WILLIAMS, L.J., after a full account of it, said, at p. 640, that the effect of each of the judgments in that case was that, to impose a liability upon the possessor of land in such a case, there must be either the creation of a nuisance by him or a continuance by him of a nuisance. FLETCHER MOULTON, L.J., said, at pp. 642, 643:

> In a case where the nuisance is created by the act of a trespasser, it is done

> without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognises that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance, and not the original causing of it.

He added that the knowledge of servants and agents for whom the owner is responsible must be attributed to him, and that cases might A arise in which his or their want of knowledge might be due to neglect of duty. FARWELL, L.J., made remarks to precisely the same effect, at p. 645. I can find nothing to show that the observations to which I have referred were confined to cases where there was a public nuisance.

The case which was most relied on by the respondents, however, was B *Job Edwards, Ltd.* v. *Birmingham Navigations* (10). It was a case where refuse carried over the defendants' embankment and land on to the land of certain mine-owners but without their consent, was found to be on fire. The defendants called on the mine-owners to extinguish it. They declined, but ultimately it was extinguished by the defendants, C without prejudice to the legal position. The mine-owners then brought an action for a declaration that they were not liable to pay any part of the cost of putting out the fire, which was a large sum. It was held by BANKES, L.J., and ASTBURY, J., that the mine-owners were not liable, since there was no public nuisance and no evidence that they D either caused or continued the fire, or were guilty of any negligence in relation to it. SCRUTTON, L.J., dissented in a vigorous judgment in which a great many cases are considered, and he thought that there should be a new trial. He approved the statement of the law in SALMOND ON TORTS, 5th Edn., pp. 258-265:

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> When a nuisance has been created by the act of a trespasser or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

F In more recent editions, the editor cites *Job Edwards, Ltd.* v. *Birmingham Navigations* (10) as authority for the different view, but he cites the case with doubts: 9th Edn., p. 246, note (*c*).

The case of internal fires on large refuse-heaps may require special consideration, but I think that this statement of the law is correct, at G any rate, in the case of a nuisance such as the one which is being considered on this appeal. The view of the facts taken by BANKES, L.J., and ASTBURY, J.—namely, that there was no evidence that the plaintiffs either caused or continued the nuisance, or were guilty of any negligence in relation to it—if it was correct, justified their conclusions. With the H greatest respect, however, I cannot agree with some of the statements which are to be found in the judgment of BANKES, L.J., and in particular I cannot agree with the distinction he draws between the duty of an occupier in the case of a public nuisance existing on his land and his duty if he allows a private nuisance on his land to continue so as to cause damage to an adjoining owner: see pp. 350, 351. I am indeed not quite sure what conclusions BANKES, L.J., arrived at, for he stated [p. 351] that he was, of course, confining his observations to the case

> . . . where the possessor of the land on which the nuisance exists is entirely innocent of either creating, or continuing it.

That was not the case, I think, in *A.-G.* v. *Tod Heatley* (12), in which the defendant with knowledge permitted his land to become a public nuisance, and, as A. L. SMITH, L.J., observed, at p. 570, was maintaining his property so as to be a public nuisance. BANKES, L.J., relied in support of his view—namely, that the standard of duty required of the occupier of land in the case of injury resulting from a private nuisance was very different from that required if a public nuisance were created —on the common law right of abatement, which he said pointed to the conclusion that in some cases the law did not afford any other remedy. I do not find it easy to understand this. Abatement exists in most, but not in all, cases of private nuisance. It also generally exists in the case of a public nuisance, in so far as it causes special injury to a private individual. For the present purpose, however, the part of the judgment which I am venturing to doubt is his remark, at p. 352 :

> . . . the mere refusal or neglect to remove the nuisance, if it be a private nuisance does not in my opinion of itself constitute a default.

If that were true, an occupier might allow a private nuisance of a most serious character to continue to exist on his land for, say, 20 years without making any effort to stop it. This seems to be the effect of a passage in CLERK AND LINDSELL ON TORTS, 7th Edn., p. 419, quoted by ASTBURY, J., at p. 365, but, for my part, following SCRUTTON, L.J., I prefer the proposition stated in SALMOND ON TORTS which I have cited above : see also CLERK AND LINDSELL ON TORTS, 9th Edn., p. 476.

The statement that an occupier of land is liable for the continuance of a nuisance created by others, e.g., by trespassers, if he continues or adopts it—which seems to be agreed—throws little light on the matter, unless the words " continues or adopts " are defined. In my opinion, an occupier of land " continues " a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so. He " adopts " it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences, I am not attempting exclusive definitions. Those statements, I think, have the authority of the judges in *Barker* v. *Herbert* (11), at pp. 642, 645, of three of the judges in *Saxby's* case (9), of SIR GEORGE JESSEL, M.R., in *Broder* v. *Saillard* (6), of the three judges in *Buckley (R. H.) & Sons, Ltd.* v. *Buckley (N.) & Sons* (8), of SCRUTTON, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10), and of a number of other decisions to which he refers.

My Lords, in the present case, I am of opinion that the respondents both continued and adopted the nuisance. After the lapse of nearly 3 years, they must be taken to have suffered the nuisance to continue, for they neglected to take the very simple step of placing a grid in the proper place, which would have removed the danger to their neighbour's land. They adopted the nuisance, for they continued during all that time to use the artificial contrivance of the conduit for the purpose of getting rid of water from their property without taking the proper A means for rendering it safe. For these reasons, I am of opinion that this appeal should be allowed for damages to be assessed with costs here and below (the costs here being those allowed in the case of a pauper appellant); but the appellant must be left to bear the costs he has been ordered to pay to the defendant Lilian Hillman, against whom B the action was dismissed, and as regards which order there has been no appeal.

LORD ATKIN: My Lords, I do not propose to recapitulate the facts in this case, which have been sufficiently stated in the opinion just C delivered by VISCOUNT MAUGHAM. I treat it as established that the entrance to the offending pipe, when it was laid, was on the defendants' land, abutting on the premises occupied by the plaintiff. I agree with the finding of the judge, accepted by the Court of Appeal, that the laying of a 15-ins. pipe with an unprotected orifice was, in the circum- D stances, the creation of a nuisance, or of that which would be likely to result in a nuisance. It created a state of things from which, when the ditch was flowing in full stream, an obstruction might reasonably be expected in the pipe, from which obstruction flooding of the plaintiff's ground might reasonably be expected to result, though I am not satisfied E that, granted this reasonable expectation of obstruction, it would be necessary for the plaintiff to prove that the particular injury was such as reasonably to be expected to result from the obstruction. If the defendants had themselves laid the pipe in the manner described, I have no hesitation in saying that, once the plaintiff had suffered damage F from flooding so caused, he would have had a good cause of action against them for nuisance. It is probably strictly correct to say that, as long as the offending condition is confined to the defendants' own land without causing damage, it is not a nuisance, though it may threaten to become a nuisance. Where damage has accrued, however, the G nuisance has been caused. I should regard the case on this hypothesis as having the same legal consequences as if the defendants, instead of laying a pipe, had placed an obvious obstruction in the course of the ditch. The question here is what the legal position is if such an obstruction is placed by a trespasser. In the present case, I consider it established H that the defendants by their responsible agents had knowledge of the erection of the pipe, of the reasonable expectation that it might be obstructed, of the result of such obstruction, and of its continued existence in the condition complained of since it was first placed in position. Brother Dekker, a member of the community, was in charge of the defendants' farming operations, and obviously represented the defendants in this matter, so far as is relevant. He had doubtless no authority to consent to a trespass, and probably no authority to incur any appreciable expense in remedying it, but the defendants obviously had to rely upon him to report to them what was found on the farm likely to be injurious to them or their neighbours.

In this state of the facts, the legal position is not, I think, difficult to discover. For the purpose of ascertaining whether, as here, the plaintiff can establish a private nuisance, I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied—or, in some cases, owned—by oneself. The occupier or owner is not an insurer. There must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required, which is connoted in my definition by the word "use." This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance. We may eliminate, in this case, "caused." What is the meaning of "continued"? In the context in which it is used, "continued" must indicate mere passive continuance. If a man uses on premises something which he finds there, and which itself causes a nuisance by noise, vibration, smell or fumes, he is himself, in continuing to bring into existence the noise, vibration, smell or fumes, causing a nuisance. Continuing, in this sense, and causing are the same thing. It seems to me clear that, if a man permits an offensive thing on his premises to continue to offend—that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it—he is permitting the nuisance to continue. In other words, he is continuing it. The liability of an occupier has been carried so far that it appears to have been decided that, if he comes to occupy, say, as tenant, premises upon which there exists a cause of nuisance caused by a previous occupier, he is responsible, even though he does not know that either the cause or the result is in existence. This is the decision in *Broder* v. *Saillard* (6), where the defendant had taken the tenancy of premises the stables of which were erected upon an artificial mound of earth which adjoined the plaintiff's house, and into which rain and the drainage from the stables penetrated, and so caused the plaintiff's wall to be damp. SIR GEORGE JESSEL, M.R., said, at p. 700:

> . . . the made earth was the chief cause of the mischief, perhaps not the sole cause. That being so, I think, both on principle and authority, the lessee in possession of the house where the artificial work is ought to be responsible for the nuisance occasioned by the existence of that artificial work.

It is to be noted that the mound of earth had not been made by the defendant, or by anyone for whose acts he was responsible. It may be remarked, however, that the judge attributed this dampness as being due, probably, to the water used in the stables, and possibly the defendant on that ground may be said to have caused the nuisance. The case is referred to in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10) by both BANKES, L.J., at p. 351, and SCRUTTON, L.J., at p. 355, as a case where liability was imposed, because the occupier had taken the land with an artificial nuisance on it, and, as BANKES, L.J., said, A was liable for its continuance. If nothing more than this can be said, then such cases impose very stringent liabilities, for in *Broder* v. *Saillard* (6) knowledge of the tenant was negatived. Similarly, in *Humphries* v. *Cousins* (13), a drain which began on the defendant's premises passed under other houses and received their drainage, and B then returned under the defendant's premises and passed beneath the plaintiff's house. The return drain beneath the defendant's premises was decayed, and allowed drainage to escape, which passed into the plaintiff's premises. The defendant was ignorant even of the existence of the return drain. He was held liable for nuisance. It is probable, C however, that the principle of *Rylands* v. *Fletcher* (3), though not referred to in the case, would justify the decision, as suggested in WINFIELD ON TORTS, at p. 470. It is possible that the question how far a person is liable for injury to a neighbour's land from a cause emanating from his own land where he himself is ignorant of the cause D or effect has still to be determined, though I cannot but think that the reference to this liability as due to the maxim *sic utere tuo*, which appears to be expressly affirmed in this House in *St. Helen's Smelting Co.* v. *Tipping* (14), affords a clue to the problem: see the direction of MELLOR, J., at p. 644, approved by the judges, at p. 649, and expressly E approved by LORD WESTBURY, L.C., LORD CRANWORTH and LORD WENSLEYDALE.

In the present case, however, there is, as I have said, sufficient proof of the knowledge of the defendants both of the cause and of its probable effect. What is the legal result of the original cause being due to the F act of a trespasser? In my opinion, the defendants clearly continued the nuisance, for they come clearly within the terms I have mentioned above. They knew the danger, they were able to prevent it, and they omitted to prevent it. In this respect, at least, there seems to me to be no difference between the case of a public nuisance and that of a private G nuisance, and *A.-G.* v. *Tod Heatley* (12) is conclusive to show that, where the occupier has knowledge of a public nuisance, has the means of remedying it, and fails to do so, he may be enjoined from allowing it to continue. I cannot think that the obligation not to "continue" can have a different meaning in "public" and in "private" nuisances. H If an individual could have proved special damage caused by the nuisance in *A.-G.* v. *Tod Heatley* (12), he could surely have recovered damages. The only express authority for the contrary is what I consider to be the *dicta* of BANKES, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10), which, coming from that learned lawyer, demand careful consideration. While maintaining the obligation of an occupier for continuing a nuisance, BANKES, L.J., finds, in the case of a private nuisance where a nuisance has been caused by a trespasser, that the occupier is not liable unless it is allowed to continue by his act or default, and that the mere refusal or neglect to remove the nuisance is not a default. In his opinion, the only right of the person injured in such a case is to enter upon the occupier's land and abate the nuisance, and this remedy was given because it was recognised that in some cases the person injured would have no other remedy. My Lords, I cannot believe that the injured person in such cases is left by the law so defenceless. The remedy of abatement inevitably tends to disorder, and has been on many occasions spoken of with discouragement. It affords no remedy at all for damage actually done. It never was intended for any purpose but to prevent repetition, or in some cases, it may be, to prevent damage before it occurred, as in the case of overhanging eaves: *Penruddock's Case* (15), where POPHAM, C.J., on error to the King's Bench from the Common Pleas, held that the plaintiffs might abate the nuisance before any prejudice (p. 101 (*b*)). With all respect, I cannot agree with these *dicta*. They do not represent the decision of the court, for SCRUTTON, L.J., dissented, while ASTBURY, J., decided in favour of the defendants, on the ground that, between the date when the defendants first knew of the danger and the date of the writ, the parties had been in negotiation, and the time had not elapsed at which the defendants could be said to have permitted the nuisance to continue. The decision in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10) was said to follow the decision in *Saxby* v. *Manchester & Sheffield Ry. Co.* (9). It is difficult from the report of the latter case to ascertain the facts precisely, but it appears that the defendants were proprietors of a stream called Todd's Brook, and that they had diverted a portion of the stream by a new cut through which water flowed to the works of both the plaintiff and one Welch. Welch, while occupying both works, erected a weir in the new cut, which impeded the flow into the works which the plaintiff ultimately acquired. When the plaintiff came into possession of his works, he removed the weir, but later someone unknown restored the weir. The case was tried before CHANNELL, B., and a jury at the Chester Assizes, and the judge directed a non-suit, on the ground that there was no evidence of obstruction by the defendants. The Court of Common Pleas discharged a rule for a new trial. BOVILL, C.J., said, at p. 203, that there might have been something for the jury if it had been shown that the defendants had sanctioned or approved of the act of Welch, or had derived any benefit from it, but nothing of the kind appeared. I do not understand this, for it is expressly stated that it did not appear by whom the second obstruction, which was the one complained of, had been replaced. The other judges concurred, resting entirely, as far as the judgments of KEATING and MONTAGUE SMITH, JJ., are concerned, on the special facts of the case. KEATING, J., addressed himself, following

BOVILL, C.J., to the continuance by the defendants of the obstruction by Welch. It looks from the pleadings as though the 3 counts of the declaration averred only an obstruction by the defendants themselves, and made no reference to continuing or permitting an obstruction. If so, the decision can be explained. In any case, I think that this decision can only be supported on the special facts of that case. If the opinions of the judges are to be treated as of general application, in my opinion, they are contrary to principle, and the decision must be overruled. I think, therefore, that, in the present case, the plaintiff established the liability of the defendants to him, and that the appeal should be allowed. The orders of the judge and the Court of Appeal should be set aside and judgment entered for the plaintiff for damages to be assessed. I see no reason for making any special order as to the costs ordered to be paid by the plaintiff to Hillman, the second defendant, against whom he failed. The respondents should pay to the plaintiff his costs of the action and of the appeal to the Court of Appeal and to this House, so far as appropriate to a pauper appeal.

LORD WRIGHT: My Lords, my noble and learned friend VISCOUNT MAUGHAM has stated the facts of this case. There is thus no need for me again to detail them, as they are now so fully and adequately before your Lordships. The Court of Appeal, in affirming the decision of BRANSON, J., decided this case on a rule of law which they derived from *Job Edwards, Ltd.* v. *Birmingham Navigations* (10). They stated this rule to be that, where a private nuisance has been created upon a man's land by a trespasser, he is not liable for it, and that, in the case of such a private nuisance, created without his authority by another, mere failure on his part, or even refusal, to remove the nuisance does not involve him in liability for its results. I should infer from the judgment of the Court of Appeal, which MACKINNON, L.J., delivered, that the Court of Appeal were proceeding rather on the basis of the authority of *Job Edwards, Ltd.* v. *Birmingham Navigations* (10), and also upon that of *Saxby* v. *Manchester & Sheffield Ry. Co.* (9), than upon any opinion of their own as to the correctness of these decisions. The court acceded without demur or discussion to a request on behalf of the appellant for leave to appeal to this House.

In my opinion, for reasons which I shall briefly explain, I think that the appeal should succeed. If it were merely a question of the physical conditions, no one would question that a case of private nuisance was established. The interposition of the pipe as the means of carrying the water from the ditch in place of the former open watercourse was not in itself objectionable. The trouble was that no protecting grid was put in place, and there was nothing to prevent the pipe from getting choked. There was thus the risk of a flood, which might spread, as in fact happened, to the appellant's premises, causing damage which in the actual result was considerable. The structure of the orifice of the pipe was on the respondents' land. If the work had been done by or on behalf of the respondents, the conditions requisite to constitute a cause of action for damages for a private nuisance would be beyond question complete. I do not attempt any exhaustive definition of that cause of action, but it has never lost its essential character, which was derived from its prototype, the assize of nuisance, and was maintained under the form of action on the case for nuisance. The assize of nuisance was a real action supplementary to the assize of novel disseisin. The latter was devised to protect the plaintiff's seisin of his land, and the former aimed at vindicating the plaintiff's right to the use and enjoyment of his land. The assize became early superseded by the less formal procedure of an action on the case for nuisance, which lay for damages. This action was less limited in its scope, because, whereas the assize was by a freeholder against a freeholder, the action lay also between possessors or occupiers of land. With possibly certain anomalous exceptions, not here material, possession or occupation is still the test. In *Cunard* v. *Antifyre, Ltd.* (16), TALBOT, J., at p. 557, succinctly defined private nuisances as interferences by owners or occupiers of property with the use or enjoyment of neighbouring property. "Property" here means land, and should be amplified to include rights over it, or in connection with it. "Occupiers" may in certain cases be used with a special connotation. The ground of responsibility is the possession and control of the land from which the nuisance proceeds. The principle has been expressed in the maxim *sic utere tuo ut alienum non laedas.* This, like most maxims, is not only lacking in definiteness but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners and yet be free from liability. This may be illustrated by *Bradford Corpn.* v. *Pickles* (17). Even where he is liable for a nuisance, the redress may fall short of the damage, as, for instance, in *Colls* v. *Home & Colonial Stores, Ltd.* (18), where the interference was with enjoyment of light. A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society. The forms which nuisance may take are protean. Certain classifications are possible, but many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances. However, where, as here, a plaintiff is damaged by his land being flooded, the facts bring it well within the sphere of nuisance. Such a case has a certain similarity with those to which the rule of *Rylands* v. *Fletcher* (3) applies, but there are obvious differences in substance. There are, indeed, well-marked differences between the two juristic concepts. This case has, therefore, properly been treated as a case of nuisance. It has affinity also with a claim for negligence, because the trouble arose from the negligent fitting of the grid. The gist of the present action, however, is the unreasonable and unjustified interference by the defendants in the user of their land with the plaintiff's right to enjoy his property. Negligence, moreover, is not a necessary condition of a claim for nuisance. What is done may be done deliberately, A and in good faith, and in a genuine belief that it is justified. Negligence here is not an independent cause of action, but is ancillary to the actual cause of action, which is nuisance.

I have adverted to these general principles, disregarding for the moment the allied, but different, case of a public nuisance, in order to B deal with the difficulty emphasised by the decision of the Court of Appeal. This difficulty is that the respondents did not create the offending structure, and in that sense create the nuisance. It was created by the Middlesex County Council, which was, or has been, treated as being a trespasser. I am not clear whether the Court of Appeal C held that the respondents were not liable for it at all or whether they held merely that they were not liable to do anything about it, and were not bound to remove it.

Though the rule has not been laid down by this House, it has, I think, been rightly established in the Court of Appeal that an occupier is not D *prima facie* responsible for a nuisance created without his knowledge and consent. If he is to be liable, a further condition is necessary—namely, that he had knowledge, or means of knowledge, that he knew, or should have known, of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in E modern law, a strict or absolute liability. If the defendant, by himself or those for whom he is responsible, has created what constitutes a nuisance, and if it causes damage, the difficulty now being considered does not arise; but he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due F to a latent defect or to the act of a trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and con- G venience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that, with ordinary care in the manage- H ment of his property, he should have realised the risk of its existence. This principle was affirmed in *Barker* v. *Herbert* (11). That was the case of a public nuisance constituted by a defective railing dividing the area of the defendant's house from the highway. A boy, playing, fell and was injured, and claimed damages. Though the nuisance was a public nuisance, and though a public nuisance in many respects differs, or may differ, from a private nuisance, yet there is, in my opinion, no difference, in the respect here material, which is that, if the defendant did not create the nuisance, he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became, or should have become, aware of it. The public nuisance in that case was created on the defendant's property, and was in that A respect more analogous to a private nuisance than to a public nuisance committed on the highway or on a common. The jury found that the gap in the railings had been created by trespassers, and that the defendant, who was not living in the house, which was vacant at the time, did not know of it at the time of the accident, and that such a B time had not elapsed between the creation of the gap and the accident that with reasonable care he should have known of it. On these findings, the Court of APPEAL (VAUGHAN WILLIAMS, FLETCHER MOULTON and FARWELL, L.JJ.) unanimously found that the defendant was not liable. FLETCHER MOULTON, L.J., thus admirably stated the law, at pp. 642, 643 : C

> In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance ; but the law recognises that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance, and not the original causing of it. An owner of premises . . . cannot be said to have permitted the continuance of that which was not caused by him, and of which he had no knowledge ; and when I say of which he had no knowledge, of D course I include the knowledge of the servants and agents for whom he is responsible. If they have knowledge of the nuisance, their knowledge must be attributed to him. I also realise that cases may arise in which his or their want of knowledge may be due to neglect of duty.

In the same case, FARWELL, L.J., in dealing with the contention that the landowner's duty was absolute, said, at p. 645 : E

> The proposition put forward is that, in the case of such an ordinary user of land [as having an area to his house fenced off the street by railings] the occupier of the premises is under an absolute obligation at all times and in all possible circumstances, for the argument made no exception even as regards the act of God or the King's enemies, to have and maintain a sufficient fence. In my opinion a landowner is not liable for a nuisance caused, not by his own action, but by something done by F another person against his will, subject to the qualification that he may become liable if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge.

These judgments, and equally that of VAUGHAN WILLIAMS, L.J., seem to me to express both good law and good sense. It is to be noted that there is nowhere any suggestion that the character of the landowner's G liability, when he is actually responsible for a nuisance not caused by himself, is in any way different from that of his liability if he has caused the nuisance, nor can I see why there should be any difference. FARWELL, L.J., at p. 646, referred to *Tarry* v. *Ashton* (19), and obviously preferred the judgment of BLACKBURN, J., to that of the other members H of that court. That was also a case of a private action for a public nuisance. The plaintiff had been injured by a heavy lamp, which was suspended from the defendant's premises over the public footway, and which fell upon him. The lamp had been erected by the defendant's predecessor, but, when the defendant came into possession, knowing that the lamp was old, he employed a competent contractor to examine it and put it into repair. The contractor negligently failed to do so. BLACKBURN, J., at p. 319, decided the case on the ground that, as the defendant knew that the lamp might be getting out of repair, it was his duty to make the lamp reasonably safe. The defendant entrusted A that duty to an independent contractor, who had failed to do the work. Hence, in the judgment of BLACKBURN, J., he was liable for the negligence of the independent contractor as much as if the contractor had been his servant, on the principles which LORD BLACKBURN again enunciated in *Dalton* v. *Angus* (20), at p. 829. This was the explanation B of *Tarry* v. *Ashton* (19) expressed by COCKBURN, C.J., MELLOR and FIELD, JJ., in *Bower* v. *Peate* (21), at p. 329. However, in addition, BLACKBURN, J., in *Tarry* v. *Ashton* (19), stated the same principles as those subsequently enunciated in *Barker* v. *Herbert* (11) as to liability for a nuisance not caused by the defendant. He said, at p. 319:

> C . . . if he did know of the defect, and neglect to put the premises in order, he would be liable.

These were cases of public nuisances, in which the plaintiff was suing as for damage of a special and particular character caused to him, but, in the material respects, I can see no difference between a claim for D private nuisance and a claim for private damage resulting from a public nuisance. The same principle was reaffirmed by the Court of Appeal in *St. Anne's Well Brewery Co.* v. *Roberts* (22), where the nuisance was a private nuisance, and was again applied by LUXMOORE, J., in *Wilkins* v. *Leighton* (23), also a case of private nuisance. *Penruddock's Case* (15) E is an old authority, which clearly involves the principle that to continue the nuisance with knowledge is a new wrong, separate from the original creation of the nuisance. The phrase " continuing the nuisance " is used in this connection in *R.* v. *Watts* (24). The modern cases have defined what is meant by " continuing."

F In these modern cases, the plaintiff failed because he did not establish that the defendant either knew or ought to have known. In the present case, it is, in my opinion, clear on the facts stated by my noble and learned friend VISCOUNT MAUGHAM that the respondents, by their servant, knew, or at least ought to have known, of the nuisance. On G the law, as I have accepted it, the respondents' responsibility would seem to follow, but the Court of Appeal held, as did BRANSON, J., that this was not so. I must accordingly refer to the two cases on which this conclusion seems to be based. The earlier is *Saxby* v. *Manchester & Sheffield Ry. Co.* (9). I confess that I have found this case most difficult H to understand. CHANNELL, B., had non-suited the plaintiff, who obtained a rule *nisi* for a new trial. The rule was discharged, but I am not clear on what ground. Nor am I clear what the precise facts were. KEATING and MONTAGUE SMITH, JJ., both rested their decision on the particular facts of the case. They thought that there was no evidence of the wrongful continuance of a nuisance which had been created by a third party. BOVILL, C.J., and BYLES, J., seem to say that the defendants, not having created the nuisance, were not bound to remove it. The case was discussed by VAUGHAN WILLIAMS, L.J., in *Barker* v. *Herbert* (11), and he said, at p. 640:

> The effect of each of the judgments is that, to impose a liability upon the possessor of land in such a case, there must be either the creation of a nuisance by him or a continuation by him of a nuisance.

On this understanding of the case, VAUGHAN WILLIAMS, L.J., seems to have thought that the case fell into line with the principles which he and his brethren had expounded in *Barker* v. *Herbert* (11). The non-suit may perhaps have been justified by the form of the pleadings. I cannot myself derive any principle from the decision, and I should have regarded it as one of those cases which should never have been reported, and which fulfil no function but to embarrass judges, were it not that in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10) the members of the Court of Appeal all treated it as an authority deciding, in the words of SCRUTTON, L.J., at pp. 358, 359, that:

> . . . an owner or occupier is not bound to remove a nuisance which neither he nor those for whom he is responsible created, even though by reasonable means he could abate it.

As I read the judgments of BANKES, L.J., and ASTBURY, J., on this basis, they held that, in the case of a private nuisance, the landowner had no responsibility, and was not bound either to remove it or to pay damages in respect of it. BANKES, L.J., at p. 350, distinguished the case of a public nuisance, which was the subject of the decision in *A.-G.* v. *Tod Heatley* (12), where there was a nuisance of filth put on the plaintiff's land by trespassers. The defendant did not cleanse it, but said that anyone affected might enter and abate the nuisance. The Court of Appeal held that the plaintiff was entitled to an injunction, though a declaration to that effect was, in the circumstances, sufficient. One of the reasons which BANKES, L.J., gives for his distinguishing it is that the common law gave a right to enter on the land and do what was necessary to abate it. On that footing, the existence of a right to abate, however difficult and inconvenient to exercise, would seem to exclude a claim for damages in any action for nuisance. I cannot agree. Damage was an essential element in the action on the case for nuisance. Thus, with reference to the right to prevent interference with light, LORD MACNAGHTEN observed in *Colls'* case (18), at p. 186:

> This right in early times was vindicated by an action on the case for nuisance —*Baten's Case* (25)—in which damages might be recovered and judgment had for removal or abatement of the nuisance.

He clearly treated the two judicial remedies as cumulative, and not exclusive. It was, however, added in *Baten's Case* (25), at p. 55 a, that, if the party aggrieved enter and abate the nuisance, he shall not have an action nor recover damages. This was for technical reasons now obsolete. That was a case of a private nuisance. I cannot see any relevant distinction for this purpose between one nuisance and another, nor can I see any reason why there should be a different rule in this respect according as the action is for a private nuisance or for a private injury from a public nuisance. Again, BANKES, L.J., treated the case before him as one in which both parties were entirely innocent, and asked why the one in whose interest the expenditure was required in order to abate the danger to himself should not be the person to bear the necessary expenditure. He was referring to the special form in which the question came before the court, the precise issue being whether owners of the land on which the nuisance had arisen were liable to pay any part of the cost of abating it. That involved in substance the question whether they were liable for it in any sense. I should have thought that the true answer was that given by SCRUTTON, L.J., in a powerful dissenting judgment. He applied the rulings of *Barker* v. *Herbert* (11), and held that the occupier was liable if, with knowledge or means of knowledge, he suffered the nuisance to continue, without taking reasonably prompt and efficient means for its abatement. SCRUTTON, L.J., also expressed the view that for this purpose there was no difference between a private nuisance and a private action for a public nuisance. He found *Saxby's* case (9) unsatisfactory. He was further of opinion that a right to abate a nuisance does not exclude a right to bring an action for damage caused by the nuisance. He cited as authorities for this proposition *Penruddock's Case* (15), *Lemmon* v. *Webb* (26), *per* KAY, L.J., at p. 24, and *Smith* v. *Giddy* (27). On this point, no authority was cited by BANKES, L.J., in support of the view taken by him except *Saxby's* case (9). SCRUTTON, L.J., quoted with approval, at p. 360, a passage from SALMOND ON TORTS, 5th Edn., s. 71 (4). It is unnecessary here to repeat the passage, as it is set out by my noble and learned friend VISCOUNT MAUGHAM in his opinion. I concur with him in approving it.

I agree with the opinion of SCRUTTON, L.J., on all the points I have mentioned. I think that the view of BANKES, L.J., was influenced or decided by a failure to appreciate what was meant by the term "continuing" a nuisance, the true meaning of which was explained in *Barker* v. *Herbert* (11) in the quotations I have given above. The logical result of the view of BANKES, L.J., would be that there was no cause of action at all if both parties could be described according to his view as entirely innocent. All it seems that the injured party would have would be a right to enter and abate. I cannot accept this conclusion. No doubt there may be a common law right to abate extrajudicially, but that is a right which involves taking the law into a man's own hand, and which is much to be discouraged, particularly if it involves entering on the other party's land. In any case, it cannot exclude a claim for damages for detriment suffered. As to the suggested hardship, both parties may be innocent of the creation of the nuisance, but, in the circumstances postulated in *Barker* v. *Herbert* (11) and the other similar decisions, the landowner cannot be deemed to be innocent of the continuance of the nuisance. He is responsible on that footing for the condition in which he keeps or uses the land, and cannot justify doing so to the detriment of his neighbour. In my opinion, the appeal should be allowed.

Lord Romer: My Lords, at the trial of this action before Branson, J., the following facts were established: (i) that the ditch at the north end of the appellant's garden was the property of the respondents, (ii) that the culvert laid down by the Middlesex County Council extended for some 2 ft. or 3 ft. into that portion of the ditch, (iii) that the insertion of that culvert without a proper guard against its getting blocked by the debris which would be likely to be washed down the ditch was an improper act which was likely at some time or another to cause a nuisance, (iv) that Brother Dekker, who was the person in charge of the respondents' farm on their behalf saw the culvert being laid, (v) that the ditch had originally been dug in the ordinary course of the user of the respondents' field, which adjoined it, in order to provide for the surface drainage of those fields, and (vi) that Brother Dekker was in the habit of cleaning out the ditch by the removal of any rubbish which might obstruct the regular flow of water. He did this, he said, to get the water away and to prevent flooding. It would seem to follow from this last-mentioned fact that, if Brother Dekker thought about the matter at all, he must have realised that, unless rubbish were prevented from entering the culvert, from which he would not be able to remove it, there would be, or might be, such an accumulation in the culvert as to prevent the water in the ditch from passing through it, and so to cause a flood.

In these circumstances, the question to be decided is whether the respondents can be held liable for the damage caused to the appellant by the floods that took place in Apr., 1937, and in Nov., 1937, which were without question due to the accumulation in the culvert of rubbish which would not have been there had a proper grid been provided in the respondents' ditch. My Lords, I should have thought that, consistently with well-established principles of law, this question only permitted of an answer in the affirmative. An owner or occupier of land must so use it that he does not thereby substantially interfere with the comfortable enjoyment of their land by his neighbours. The user of the ditch by the construction of the culvert was not, indeed, a user of their land by the respondents at all. It was the act of a trespasser. Nevertheless, the respondents continued thereafter to use the ditch for the purpose of draining their adjoining fields, without taking steps to ensure that the water did not accumulate therein, and, as a consequence, flood the appellant's premises. Such steps were well within their power. All that it was necessary to do was to provide a grid which would prevent the rubbish which fell into the ditch from passing into the culvert. In these circumstances, it seems to me that they committed a nuisance upon their land, for which they must be held responsible.

The same result may be arrived at by another line of thought. When the Middlesex County Council constructed the culvert without a proper grid to prevent its getting blocked, they created a potential nuisance. That is to say, they did something which in the future might, and did in fact, seriously damage the appellant as the occupier of No. 1, Victoria Road. The respondents did not themselves create this potential nuisance, and cannot, therefore, be held liable for its creation, but an occupier of land upon which a nuisance has been created by another person is liable if he " continues " the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question which probably does not admit of a comprehensive answer, but I agree with my noble and learned friend VISCOUNT MAUGHAM, whose opinion I have had the privilege of reading, that the occupier " continues " a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so. Judging them by this criterion, the respondents clearly continued the potential nuisance created by the Middlesex County Council. It is plain, I think, that the Court of Appeal in the present case would have held the respondents liable upon this ground if they had not considered themselves precluded from doing so by the decisions in *Saxby* v. *Manchester & Sheffield Ry. Co.* (9) and *Job Edwards, Ltd.* v. *Birmingham Navigations* (10). Both these cases have been critically examined by my noble and learned friend VISCOUNT MAUGHAM, and I agree with the conclusion at which he has arrived with respect to them. The first of them appears to be an authority rather in favour of than adverse to, the liability of an occupier of land for continuing a nuisance created by another. The second, in so far as it draws a distinction between the continuance of a private nuisance and the continuance of a public nuisance, ought not to be followed. With all respect to BANKES, L.J., I am unable to agree that there is any such difference. It is well-settled that a private individual, who suffers damage from a public nuisance greater than that sustained by the public in general is entitled to sue in respect of that damage. So far as he is concerned, the nuisance is a private nuisance, and his rights and remedies in respect of both kinds of nuisance are to be ascertained on precisely the same footing. I agree that the appeal should be allowed.

LORD PORTER: My Lords, this is an appeal from a judgment of the Court of Appeal affirming a judgment of BRANSON, J., and dismissing the plaintiff's appeal with costs. The plaintiff is the owner and occupier of a house at Mill Hill known as No. 1, Victoria Road. At the upper end of the garden, on the north side, and in the position most remote from Victoria Road, there is a ditch and, beyond the ditch, a bank with trees upon it. Admittedly, the land beyond the ditch and bank belongs to the respondents. To the west of the appellant's land there is another plot, on which stands a block of flats known as Holcomb Court. Before 1934, the ditch, after leaving the north side of the appellant's premises, passed along the northern edge of Holcomb Court to a roadway known as Lawrence Street, which runs north and south on the west of that building. In 1934, the owner of Holcomb Court made an agreement with the Middlesex County Council by which the latter agreed to place a pipe 15 ins. in diameter on the north side of Holcomb Court in substitution for the ditch. When this work was carried out, the ditch was filled in, and a garage was built on top of the pipe. At the western end, the pipe was connected with a manhole and sewer in Lawrence Street. At the eastern end, the pipe was carried to a point about 2 ft. east of a fence dividing the plaintiff's land from Holcomb Court. Originally, the outfall of the ditch into the culvert in Lawrence Street was protected by a grid placed in front of the culvert. When the new and extended pipe was inserted, this grid appears to have been taken from its original position, and, instead of being placed at a little distance from the mouth of the new pipe, it was for some unexplained reason placed on top of that pipe.

The plaintiff entered into occupation of No. 1, Victoria Road, in Feb., 1937. On Apr. 20, 1937, after a very heavy rainfall, the mouth of the pipe became blocked with refuse. The water was unable to escape, and the plaintiff's land was flooded. On Nov. 3, 1937, the plaintiff issued a writ against the respondents claiming damages for negligence and nuisance. In the argument before your Lordships' House, the claim for nuisance alone was proceeded with. The allegations upon which the action was founded were that the ditch was the property of the respondents, that the mouth of the pipe should have been protected by a grid, and that, unprotected, it was a potential nuisance, which became an actual nuisance when the flood occurred. Various other particulars of nuisance were relied upon in the pleadings, but, as the case was presented to this House, they become immaterial. The respondents denied that the ditch was their property, and alleged that, even if it were, the pipe had been inserted in it without their knowledge or authority, and that the owner of Holcomb Court and the Middlesex County Council were trespassers upon their land. In their contention, where a nuisance has been created in such circumstances by trespassers, the owner of the land is not responsible. For this contention, they relied upon *Saxby* v. *Manchester & Sheffield Ry. Co.* (9) and *Job Edwards, Ltd.* v. *Birmingham Navigations* (10). Those cases were accepted as decisive by the Court of Appeal, and were said to establish the principle that, where a private nuisance has been created on a man's land by a trespasser, he is not liable either for its creation or for the mere failure, or even refusal, on his part to remove it, which view had already been expressed in terms by Bankes, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10), at p. 352.

So far as the question of ownership is concerned, in common with all your Lordships and with all the members of the tribunals who have adjudicated on the case, I entertain no doubt that the ditch was the property of the respondents. It was proved that—at any rate with regard to that portion of the brook which lay at the back of Holcomb Court and the plaintiff's premises and at the back of the houses in Victoria Road lying immediately to the eastward of those premises—the ditch has on its north side a bank which forms part of, or is at least contiguous with, the respondents' property.

The presumption from these circumstances is that the ditch, bank and hedge belong to the owners, whose property lies on the far side of the bank. In the present case, however, it was also proved that those members of St. Joseph's Society who were entrusted with the management of its farm and fields were accustomed to clean out the ditch twice a year. Moreover, it appears that the fences of all the houses lying to the south of that portion of the ditch to which I have referred stopped short at the ditch itself, and that, though the fence between the appellant's property and Holcomb Court had been continued across the soil placed over the culvert, yet the portion so continued appeared to be newer than the portion of the fence which led south from the culvert, and may well have been erected at the time when the culvert was extended. In default of other evidence, these facts would lead to the conclusion that the ditch was the property of the respondents, and, indeed, though their representatives argued to the contrary, I think that the judge has so found.

Admittedly the alleged nuisance was a private nuisance, and it was not contended by the appellant that—at any rate until the respondents knew, or ought to have known, of the existence of the unprotected pipe—they could be held to be liable for the acts of the trespasser who constructed it. The facts with regard to knowledge appear to have been that Brother Dekker, one of the brethren in charge of the respondents' fields, saw the insertion of the culvert, and knew from the time of its erection until the flood that it existed, with the grid in its present position. He thought, however, that the consent of the respondents' trustees must have been obtained, and took no steps either to inform anyone or to protest against the action of the Middlesex County Council. Whether, in these circumstances, it could be said that the trustees had consented to the insertion of the pipe need not, I think, be considered. At least with the knowledge possessed by those persons whom the respondents left in charge of the ditch, the pipe continued for some 3 years to carry off the water in place of the ditch. Either the trustees themselves should have inspected the ditch and seen what was done, or, as I think the true view is, they were affected by the knowledge of the person to whom they entrusted their farm, and, with it, the care of the ditch.

In my view, therefore, the respondents at least acquired knowledge of the existence of the pipe and the position of the grid after it had been erected, even if they did not acquire that knowledge at the time of its erection in 1934. Their servants knew, and they certainly ought to have known, immediately after the insertion of the pipe, what the position of affairs was. It is said, however, that this knowledge creates no liability in them.

If the Court of Appeal were right in their view of the two cases quoted, and if those two cases were rightly decided, the respondents would escape liability. In considering this question, a number of cases were quoted to us, some dealing with public nuisances and some with private nuisances. So far as a public nuisance is concerned, it is established that its creation, or the failure to take reasonable steps to abate it after notice, is an actionable wrong, and that the duty to abate it lies upon the occupier though the creation be due to the act of a trespasser. *A.-G.* v. *Tod Heatley* (12) and *Barker* v. *Herbert* (11) are authorities for this proposition. In the latter case, VAUGHAN WILLIAMS, L.J., at pp. 636, 637, states that the occupier is not liable unless (i) he, or some person for whom he is responsible, created the nuisance, or (ii) he has neglected to take steps to abate it for an undue time after he became aware, or, if he had used reasonable care, ought to have become aware, of its existence. In that particular case, the occupier escaped liability because he had not had reasonable time to become aware of the nuisance. VAUGHAN WILLIAMS, L.J., quotes *Saxby's* case (9), with apparent approval, and the use of the word " continuance " made by both him and FLETCHER MOULTON, L.J., may leave open the question whether an occupier continues a nuisance created on his land by a trespasser merely by failure to abate it. In the *Tod Heatley* case (12), however, the only complaint against the owner was that he failed, by not erecting a fence, to take the proper precautions to prevent trespassers from depositing noxious things upon his land. That case is authority at least for the proposition that the occupier must take all reasonable steps to prevent the continuance of a nuisance by third parties, and, in the case now under consideration, the reasonableness of the steps which it is contended the respondents should have taken cannot seriously be disputed, if they must take any steps at all. All that was required was to take the grid from its useless position above the pipe and put it a few feet in front of it.

It is said, however, that there is a distinction between public and private nuisances. It is difficult to see upon what ground such a distinction can be supported. It is true that a public nuisance is a criminal offence, and that, in so far as it affects all the public alike, only the public, represented by the Attorney-General, can obtain an injunction, but, if a private person suffers special injury by the public nuisance, he can sue in his private capacity for the special wrong done to him. In such circumstances, the private person is just as much injured by it as by a private nuisance. Indeed, to him it is a private nuisance causing special damage.

Saxby v. *Manchester & Sheffield Ry. Co.* (9) was a peculiar case. The respondents apparently owned the banks of the stream in which the obstruction was placed, and were under a duty to repair them, but the surrounding land belonged to the appellant, and apparently there was some dispute as to the right of the respondents to interfere with the A obstruction. BOVILL, C.J., said, at p. 203:

> . . . the question is whether they [the respondents] were bound to risk the consequences of a personal conflict by doing that which the plaintiff (they assenting) might have done himself.

In any case, the decision has been the subject of considerable criticism. B Sir Frederick Pollock treats it as depending upon the fact that the defendant was not an owner in possession, and SALMOND ON TORTS, 5th Edn., treats it as unsatisfactory and queries its correctness: see the remarks in the dissenting judgment of SCRUTTON, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* (10), at p. 359. The last-mentioned C case is not, in my view, an authority for the proposition laid down by the Court of Appeal in the present case. It is true that that proposition has the support of BANKES, L.J., but SCRUTTON, L.J., dissented, and the principles relied upon by ASTBURY, J. (on whom the result depended), are a little difficult to follow. He quotes from CLERK AND LINDSELL D ON TORTS, 7th Edn., p. 419:

> . . . mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it.

If ASTBURY, J., is to be taken to regard that statement as universally E applicable, I do not agree with him, nor with the decision in *Saxby's* case (9) if it be held to go that length.

It is clear that an occupier may be liable though (i) he is wholly blameless, (ii) he is not only ignorant of the existence of the nuisance but also without means of detecting it, and (iii) he entered into occupation F after the nuisance had come into existence: see *Broder* v. *Saillard* (6). Such a liability is, I think, inconsistent with the contention that the occupier is not liable for the acts of a trespasser of which he has knowledge, though possibly it might be contended that he is responsible for the acts of his predecessor in title, but not for those of a trespasser. G Such a contention, however, is, I think, unsound, and the true view is that the occupier of land is liable for a nuisance existing on his property to the extent that he can reasonably abate it, even though he neither created it nor received any benefit from it. It is enough if he permitted it to continue after he knew, or ought to have known, of its existence. H To this extent, but to no greater extent, he must be proved to have adopted the act of the creator of the nuisance.

Finally, however, it was said that the respondents knew, it is true, of the absence of a grid in front of the pipe, but did not know, and had no reason for suspecting, that any trouble would ensue. Therefore, it was contended that they had no knowledge of the nuisance, and, indeed, that no nuisance existed, but only the potentiality of a nuisance—that is, the possibility that the pipe might become blocked and cause a flood on the appellant's land. In a sense, this is true. The nuisance is not the existence of the pipe unprotected by a grid, but the flooding of the appellant's garden, which flooding might be repeated at any time of severe rain.

The respondents, however, ought, I think, as reasonable persons, to have recognised the probability, or at least the possibility, of a flood occurring. Even if it were conceded that the appellant might, in the light of such cases as *Lemmon* v. *Webb* (26), have entered the respondents' lands after notice and placed the grid in its proper place, he was not obliged to do so. As was pointed out in *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing & Finishing Co.* (28), at p. 244, the abatement of a nuisance by a private individual is a remedy which the law does not favour. Moreover, in the present case, the evidence shows that the appellant had no knowledge of, or reason to suspect, the existence of any trouble owing to the pipe. However, the respondents had, as I have indicated, or ought to have had, knowledge of the danger, and could have prevented the danger if they had acted reasonably. For this I think they were liable—not because they were negligent, though it may be that they were, but for nuisance, because, with knowledge that a state of things existed which might at any time give rise to a nuisance, they took no steps to remedy that state of affairs. The appellant is, in my opinion, entitled to succeed.

Appeal allowed.

Solicitors: *Maltz, Mitchell & Co.* (for the appellant); *Witham & Co.* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

GEARS AND ANOTHER *v.* BRALEY.

[Court of Appeal (Luxmoore and Goddard, L.JJ.), **June 25, 1940.**]

Practice—Payment into court—Several causes of action—Payment in of lump sum—Discretion of court—Different classes of persons beneficially entitled—R.S.C., Ord. 22, *r.* 1 (1) (2).

The plaintiff, whose wife was killed as a result of a motor car accident, commenced action against the persons responsible, suing both as administrator under the Law Reform (Miscellaneous Provisions) Act, 1934, and also on behalf of himself and other dependants of the deceased under the Fatal Accidents Acts, 1846-1908. The defendants thereupon took out a summons asking for leave to make a payment into court in one sum in respect of the claims of the plaintiff in his two capacities:—

Held: where, as in this case, there are different classes of persons beneficially entitled to the damages, the court or a judge should, in the exercise of the discretion conferred by R.S.C., Ord. 22, r. 1 (2), refuse leave to pay into court a lump sum in respect of two separate causes of action.

[EDITORIAL NOTE. Where there are several causes of action, the rules require that money paid into court shall be allocated to the causes of action in respect of which it is paid in. The rule, however, ends with the words "unless the court or a judge otherwise order." It is here decided that, where claims are made both under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, 1934, the court will not, in the exercise of its discretion, release the defendant from the obligation of allocating a payment into court, although there are different classes of persons beneficially entitled to the damages. The reason for this would appear to be that the rules provide no machinery for the court to allocate such a sum, and it is suggested that this may be a proper case for the amendment of the rules.

AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 62, para. 100; and FOR CASES, see DIGEST, Practice, pp. 478-484, Nos. 1590-1637.]

INTERLOCUTORY APPEAL by the defendant Braley from an order made in chambers by STABLE, J., on May 28, 1940. The plaintiff was the widower of a woman who was killed as a result of a motor-car accident, and the administrator of her estate. He commenced an action in the High Court against the persons involved in the collision, suing as administrator under the Law Reform (Miscellaneous Provisions) Act, 1934, and personally under the Fatal Accidents Acts, 1846-1908. The defendants applied to Master BALL on May 22, 1940, for leave to make a payment into court of one sum in respect of the claims of the adult plaintiff in his two capacities. The master refused leave, and his decision was upheld by the judge. The defendant Braley appealed.

H. D. Samuels, K.C., and *N. R. Fox-Andrews* for the appellant.

Tristram Beresford, K.C., and *E. Ryder Richardson* for the respondents.

LUXMOORE, L.J.: This is an appeal from an order of STABLE, J., who refused to alter the decision of Master BALL, on a summons taken out by the defendant asking that he might be at liberty to make a payment into court in one sum in respect of the claims made in an action by the administrator of a deceased person under the Law Reform (Miscellaneous Provisions) Act, 1934, and also for damages under Lord Campbell's Act. Obviously the two causes of action, which arise out of the same event—namely, the death of the person named—are separate causes of action. The action under the Law Reform (Miscellaneous Provisions) Act, 1934, is brought by the plaintiff in this case as the administrator of the estate of his deceased wife. That claim as administrator is made on behalf of the persons interested in the deceased's estate. The claim which he makes under Lord Campbell's Act is made by him, it is true, as the administrator of the deceased person, but it is not made on behalf of those persons who are interested in the deceased's estate. It is made on behalf of himself and of all those persons who come within the category of the dependants of the deceased. Therefore, the persons beneficially interested in the damages recovered in respect of each cause of action are not all the same persons, or are not necessarily the same persons.

Before 1933, it was impossible to make a payment in of one sum of money in respect of a number of causes of action. In each case, where there was more than one cause of action and it was desired to make a payment in, the money paid in had to be allocated to each separate cause of action. An alteration was made in the rules in 1933. The material order is R.S.C., Ord. 22, r. 1 (1), (2). Rule 1 (1) provides as follows :

> In any action for . . . damages . . . the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action . . . A

Then there is a provision with regard to tender which is immaterial. Then r. 1 (2) provides as follows : B

> Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action, unless the court or a judge otherwise order.

It is quite plain that the first part of the rule provides that, where C
more than one cause of action is joined together, and where a payment into court is made, it is necessary to allocate the payments. However, there is this *locus penitentiæ*. One can go to the court and ask the court to allow one to pay in one sum in respect of the various causes of action. Of course, if there is only one person interested and, under the separate D
causes of action, the damages must necessarily go to that one person, it is inconceivable, I think, that the court would require any allocation of the money. Where, however, there are different classes of persons beneficially entitled to the damages, it seems to me that it would be an entirely wrong exercise of any discretion conferred on the court E
under R.S.C., Ord. 22, r. 1 (2), to allow a lump sum to be paid in. Difficulties would arise at once with regard to the payment of the moneys between all the various persons beneficially entitled. Indeed, in those circumstances, I am at a loss to understand by what particular procedure the court could be asked to deal with the matter, short of bringing some F
new action. That would be something which the court would hardly be justified in putting on the parties interested in the damages, as a result of acceding to a request by the defendant to allow one sum of money to be paid in with respect to several causes of action.

In my judgment, the master, and the judge in supporting him, were G
right in the exercise of their discretion in this case in refusing to allow one sum to be paid in with respect to the various causes of action. I quite appreciate that this may be to some extent a hardship on a defendant in those cases which, like the present, arise out of fatal accidents, where there are two claims, one under Lord Campbell's Act and the other H
under the Law Reform (Miscellaneous Provisions) Act, 1934, but, although I express my sympathy with the defendants in having to make the allocation, I have no doubt in my own mind that, under the order, it would be wrong for the court to direct that one payment should be made in respect of the two causes of action. For these reasons, I think

that the appeal fails, and must be dismissed. The defendant must be ordered to pay the costs of the appeal in any event.

GODDARD, L.J.: I agree. If times were more propitious, I could wish that this matter could be considered by the Rule Committee,
A because I think that it puts a very great burden upon a defendant, especially when one remembers that, in dealing with damages under the Law Reform (Miscellaneous Provisions) Act, 1934, it has been said more than once that one is dealing with what is really a metaphysical problem. If the action comes to trial—that is, if the plaintiff does not
B take the money out—and at the trial the plaintiff does not recover more in the aggregate than has been paid into court, although the judge may make a different allocation in the sense that he may give more or less in respect of the loss of expectation of life than is paid into court and more or less in regard to Lord Campbell's Act, it might happen,
C and would in many cases be very proper, if the defendant has paid in in the aggregate as much as, or more than, is awarded, that the plaintiff should get no costs. That could be dealt with in any case of the kind which might arise. The difficulty which I see, however, is, if a lump sum were paid in, how the master is to deal in
D chambers with the question of how much of that lump sum is to go to the widower plaintiff as administrator of the estate generally, or to the widower as administrator, as the case may be, under the Law Reform (Miscellaneous Provisions) Act, 1934, and how much should go to him as administrator under Lord Campbell's Act, where the
E beneficiaries or the persons entitled to share in the benefit of the estate may be quite different. I think that it is a matter which might be, and probably could be, dealt with by rule, by giving the master jurisdiction to hold an inquiry, or to hold some sort of trial, if necessary, if it were thought right. At present, however, I do not think that there
F is machinery for doing that, and it seems to me, for the reasons which LUXMOORE, L.J., has given in greater detail, and which I need not repeat, though I come to the conclusion with some regret, that this order is perfectly right, and that we cannot accede to the application which the defendant makes.

G *Appeal dismissed with costs against both defendants.*

Solicitors: *White & Co.* (for the appellant); *Clifford-Turner & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

HORTON *v.* HORTON.

[Probate, Divorce and Admiralty Division (Bucknill, J.), **June 6, 7, 11, 12, 13, 19, 1940.]**

Divorce—Cruelty—Wife's cruelty—Petition for divorce based on cruelty—Definition of cruelty for purposes of divorce—Wilful and unjustifiable acts—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2 (*c*).

The parties were married in 1902 and in 1935 the petitioner parted from his wife. In 1939 he filed a petition for divorce based on allegations of cruelty by the wife. The cruelty alleged was nagging complaints of his association with other women, charges of hypocrisy in relation to his religion and Masonic activities, certain small acts of violence, and certain damage to his personal effects. Medical evidence showed that his health had been affected:—

Held: the wife's conduct amounted to legal cruelty, as there was proof of unjustifiable acts inflicting pain and misery on the petitioner and causing injury to his health. The petitioner ought, therefore, to be granted a decree *nisi*.

[EDITORIAL NOTE. This is the first case in which the nature of cruelty requisite to justify a decree of divorce under the Matrimonial Causes Act, 1937, is considered. The Act does not define the term, but it is held that it cannot have a wider or more liberal meaning than that which the courts have assigned to it in proceedings for judicial separation based on that ground.

As to Definition of Cruelty, see HALSBURY, Hailsham Edn., Vol. 10, p. 649, para. 954; and for Cases, see DIGEST, Vol. 27, pp. 290, 291, Nos. 2649-2661.]

Case referred to:

(1) *Russell* v. *Russell*, [1897] A.C. 395; 27 Digest 291, *2661*; 66 L.J.P. 122; 77 L.T. 249.

Husband's Petition for dissolution of his marriage on the ground of the wife's cruelty. The facts are fully set out in the judgment.

D. N. Pritt, K.C., and *R. Ritson* for the petitioner.

H. W. Barnard, K.C., and *G. C. Tyndale* for the respondent.

Bucknill, J.: This is a petition by William Henry Horton for the dissolution of his marriage to Florence his wife on the ground of her cruelty. The wife has denied that she had been guilty of cruelty to her husband, and the court has to decide whether the husband has proved his case. The marriage took place in 1902, the husband being then 27 years of age, and the wife, according to the marriage certificate, 23 years of age, so that each is now over 60 years of age. A son, Stratford, was born in 1905, and another son, Frank, in 1910. The conflict between the parents has extended to the children. The elder son was a witness for his father, while the younger son was a witness for his mother.

The husband is a manufacturer, with a business in Northampton, and he and his wife lived there throughout their married life. In Jan., 1934, the wife went away for a month from the matrimonial home on the advice of the family doctor, because husband and wife were getting on each other's nerves. In Jan., 1935, the husband left his wife and the matrimonial home, asserting that it was impossible for him to live with his wife. He remained apart from his wife, and, in Oct., 1937, a deed of separation was signed, under which he agreed to allow her £400 per annum. In July, 1939, the husband filed this petition, 18 months after the Matrimonial Causes Act, 1937, giving a right to divorce in cases of cruelty, had been enacted.

The husband left the wife on Jan. 2, 1935, when he wrote this letter to her:

> My dear Flo, I am truly sorry that you have made it impossible for me to live with you any longer, so do not expect me to return. I am willing to make reasonable provision for you and have instructed Mr. Chamberlain in the matter. If you will see him, he will explain what I propose to do. You have repeatedly told me that you desire a separation. What plans you may have I do not know, but in any case I hope you will find happiness. With regret, Harry.

Her reply on Jan. 3, 1935, was as follows:

> My dear Hal, Your letter has dealt me a cruel blow. I have never had any desire for a separation, so let that be quite plain. I have no plans as you know full well. All I have ever asked is for that love and confidence you have so long withheld. I cannot see Mr. Chamberlain at present. If there is any hurry, perhaps you will ask him to communicate with me. Yours always, Flo.

Why was it impossible for the husband to live with his wife? In my judgment, it was impossible because the conduct of his wife towards him had made him ill. Dr. Dunbar, who was called as a witness, and who was a very fair and impartial witness, said that at that time the husband was suffering from neurasthenia, which was manifested by twitching and sleeplessness. After the husband had lived away from his wife for some time, his health improved considerably. I am satisfied that this neurasthenic condition was due to the miserable existence which the husband lived in his home through his wife's behaviour to him. Was the wife, then, guilty of legal cruelty? Her conduct had caused injury to health, injury which was not serious in itself, but which would have become more serious if he had remained in the matrimonial home. The question which I have to decide is whether that conduct amounted to cruelty.

In my view, the most serious series of charges of cruelty made by the husband against the wife is the allegation that from time to time, out of jealous spite, she damaged various things belonging to him, and in particular his masonic clothing, several of his hats, a presentation gold cigarette case, a presentation silver salver, and the lens of one of his spectacles, which she deliberately scratched, probably with a diamond. These are serious charges. If made out, they show a malevolence which is likely to bear fruit in acts of cruelty. They show an evil, unwifely spirit, far more serious, to my mind, than mere nagging and possessiveness and jealousy. Are these charges, or any of them, established? It is quite true that it is a case of oath against oath, but I preferred the husband as a witness to the wife. The most serious charge relates to the scratching of one of the lenses of his spectacles. The husband is a short-sighted man, who always has to wear spectacles.

His evidence was that in May, 1934, he promised to take his wife and younger son in his car to Cambridge, where he was to attend a Masonic gathering. Being of an hospitable nature, and in this respect different from his wife, who, I think, much preferred to live in the strict seclusion of her own immediate family, on the day before the trip he invited a brother Mason to occupy the spare seat in the car. This, he said, infuriated his wife, who complained that he had spoilt her enjoyment. On the following morning, when he got up, he left his spectacles in the bedroom while he went to his bath. On his return he found one of the lenses badly scratched. The lens was produced in court. His wife denied any knowledge of the damage, and suggested that the damage was done by an emery-board for finger-nails which the husband carried in his pocket. The husband asserted that he taxed his wife with doing the damage, and actually deducted the cost of a new lens—namely, £1 4*s.*—from her housekeeping allowance. The only reasonable alternative to the contention that the wife did the damage seems to me to be that the husband deliberately concocted the story for the purpose of obtaining a divorce. I do not think that the husband invented the charge of damage; and I accept his evidence on this point. I am driven to the conclusion that the wife deliberately did the damage, and has lied about it in the witness-box. As regards the damage to other articles of which the husband complains, the evidence is not so strong, and I come to no definite conclusion about the cigarette case and the salver. I find that she did the damage to his Masonic regalia, and to his panama hat.

The acts of physical violence of which the husband complains relate to (i) the occasions when he asserts that his wife snatched the spectacles off his nose, and they were broken in consequence, (ii) the occasion when he finally left the house, in Jan., 1935, and (iii) an assault at his office, in Aug., 1936. I accept his evidence on these charges. I think that the kick on the leg by the wife when he left has been exaggerated by the husband, because it is not mentioned in his letter, in which he sums up his complaints against his wife. The younger son, who was called as a witness, and who was in the dining-room when his father left, did not hear any scuffle or struggle in the hall, but admittedly there was some kind of a struggle. I thought that the elder son's evidence was rather more convincing than the evidence of the younger son, though the elder son did not give any evidence relating to this particular time. At that time, he was married and away from his parents. Each son, however, was in a difficult and painful position when giving evidence here.

The third charge made by the husband against the wife is the charge of perpetual nagging, accusations against him of associating with other women, complaints about his absence from home on Masonic business, charges of hypocrisy about his religion, and so on. This course of conduct was carried on at night. The husband said that his wife refused to allow him to sleep in a separate room or in a separate bed, and, when he was tired out and tried to go to sleep, she would dig him in the back with her elbow and prevent his sleeping, and at times would even slap him on the face for the same purpose. Are these allegations true? Broadly, I accept the evidence of the husband on these points. I do so, not only because I thought his evidence seemed to be true, but also because the evidence of Dr. Dunbar seemed to support his case. I was particularly impressed by the statement of Dr. Dunbar that he was called to see the wife about a year before her husband left her, and found her in a very hysterical state. She suggested to Dr. Dunbar that her husband had been trying to poison her. Dr. Dunbar said that he found absolutely no evidence for this charge, which appeared to him to be a most extraordinary statement for her to make. The wife denied ever having made any such statement. She is a woman who, I think, may say and do things which she very soon forgets, but I am satisfied that she did make this statement to Dr. Dunbar.

I think that the evidence all points to the fact that the husband was fond of his home, fond of his children, fond of his dog, and wanted to be fond of his wife. He was a public-spirited citizen of Northampton, and a man who would greatly resent the gossip which his leaving his wife and home must spread. I am satisfied that he was a good husband and father, and that he was driven from his home by his wife's conduct towards him.

Do these facts, which I have found to be true, establish the charge of cruelty? The Matrimonial Causes Act, 1937, s. 2, enacts that a petition may be presented to the High Court, either by the husband or by the wife, on the ground that since the celebration of the marriage the respondent has treated the petitioner with cruelty. The Act does not define cruelty, but without doubt the legislature intended the word to have the meaning assigned to it by the courts in many earlier matrimonial cases in which judges have considered whether or not one spouse has been cruel to the other. I take as my guide in this matter the opinion of Lord Herschell in *Russell* v. *Russell* (1), at pp. 445, 456, 457:

> It . . . is, indeed, beyond controversy, that it was not every act of cruelty, in the ordinary and popular sense of that word, which amounted to *saevitia*, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that relief could not be obtained . . . Upon a review of the authorities prior to the time when the Divorce Act [of 1857] came into operation, I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health or a reasonable apprehension of one or other of these . . . the principle or rule that a judicial separation can only be granted on the ground of cruelty where there has been injury to body or health, or the reasonable apprehension of it, has been frequently recognised and acted upon since 1858. The law has never been enunciated in other terms, and no other test has been suggested as the correct one.

When *Russell* v. *Russell* (1) was decided, the remedy for cruelty was a legal separation. It cannot be supposed that a wider or more liberal meaning should be attached to the word "cruelty" now that it is a ground for divorce. The question for me, therefore, is whether I am satisfied on the evidence that the wife has committed wilful and unjustifiable acts inflicting pain and misery upon her husband, which have caused him bodily hurt or injury to his health, or which have caused him reasonable apprehension of such hurt or injury. Mere conduct which causes injury to health is not enough. A man takes a woman for his wife for better or for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think that he establishes cruelty merely because he finds that life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing injury to his health. In this case, the husband's health was not injured merely by the development and manifestation of the wife's character acting, so to speak, in its own sphere. It was injured by her wilful and unjustifiable conduct to him, which was an intrusion upon, and did violence to, his own mode of living. It was this course of conduct which injured his health, and which, in my view, amounted to legal cruelty. I find, therefore, that the petitioner has proved his case.

Decree nisi granted.

Solicitors: *Crosse & Sons* (for the petitioner); *Samuel Price & Sons* (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

BROWNLEE *v.* MACMILLAN.

[Privy Council (Viscount Caldecote, L.C., Viscount Sankey, Lord Thankerton, Lord Russell of Killowen and Lord Roche), **March 11, 12, June 4, 1940.**]

Privy Council—Canada—Seduction—Action by female seduced—No evidence necessary of disability for service consequent on seduction—Seduction Act (*Alberta*), 1922 (c. 102), *ss.* 1, 2, 3, 4, 5.

The respondent claimed damages against the appellant under the Seduction Act (Alberta), 1922. Under that Act, an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort, and in such an action she shall be entitled to such damages as may be awarded. At the trial in Alberta, the jury found in favour of the respondent. It was contended on behalf of the appellant that the respondent was not entitled to damages unless she could prove some damage consequent upon the seduction in the nature of loss of service or of inability to serve, which fact the respondent had not established:—

Held: the respondent was entitled to recover, as there was no need, on the construction of the statute, to prove disability for service.

[EDITORIAL NOTE. In England, the action for seduction has been based upon loss of service, but, in general, this has been treated as a mere legal fiction. In Alberta the matter is now regulated by an Ordinance of the North-West Territories passed in 1903. After sections in which actions by the parents based on loss of service are dealt with, the ordinance gives any unmarried female the right to bring an action, in her own name, in the same manner as an action for any other tort. A doubt had arisen whether, in this action by the seduced woman herself, she had to prove loss of ability to serve. The matter is settled by the decision herein. There is no need for the plaintiff in such an action to prove any such loss of ability and the question of service does not arise at all.

As to Actions for Seduction, see HALSBURY, Hailsham Edn., Vol. 22, pp. 247-251, paras. 428-436; and for Cases, see DIGEST, Vol. 34, pp. 171-179, Nos. 1342-1448.]

Cases referred to:

(1) *Norton* v. *Jason* (1653), Sty. 398; 34 Digest 173, *1365*.

(2) *Eager* v. *Grimwood* (1847), 1 Exch. 61; 34 Digest 175, *1395*; 16 L.J.Ex. 236; 9 L.T.O.S. 200.

(3) *Grinnell* v. *Wells* (1844), 7 Man. & G. 1033; 34 Digest 178, *1439*; 14 L.J.C.P. 19; 4 L.T.O.S. 173.

Appeal by special leave from a judgment of the Supreme Court of Canada (Sir Lyman Poore Duff, C.J., Rinfret, Kerwin and Hudson, JJ., Davis, J., dissenting). The facts and arguments are fully set out in the judgment of their Lordships delivered by Lord Thankerton.

Frank Gahan for the appellant.

The respondent did not appear and was not represented.

Lord Thankerton: This appeal comes by special leave granted on July 1, 1937, from a judgment of the Supreme Court of Canada. By a majority of four judges to one the Supreme Court allowed the respondent's appeal from a judgment of the Supreme Court of Alberta (Appellate Division) dismissing her appeal from the judgment of Ives, J., dated July 2, 1934. The respondent and her father brought an action against the appellant under the Seduction Act (Alberta), 1922, in which they severally claimed damages for the seduction of the respondent. The jury found in favour of both plaintiffs, awarding the respondent $10,000 damages and her father $5,000. Ives, J., the trial judge, expressed disagreement with the verdict of the jury, and subsequently, notwithstanding the verdict, gave judgment dismissing the action with costs, on the construction of the statute. He was of opinion that damage in the nature of loss of service, or at least of interference with the woman's ability to serve, is the gist of the action for seduction, and that there is nothing in the statute to convey a contrary intendment. In the absence of any evidence of the birth of a child or of pregnancy, he thought that the seduction of the respondent in no way interfered with her ability to serve.

Both the respondent and her father appealed. The Supreme Court of Alberta (Appellate Division) unanimously dismissed the father's appeal, and he has not appealed from that decision. The respondent's appeal was dismissed by a majority of three judges to two. Harvey, C.J.A. who thought that Ives, J., had misdirected the jury, and that for other reasons the appellant had not had a fair trial, was further in favour of dismissing the respondent's appeal, substantially for the reasons given by Ives, J. Two other judges of the Appellate Division, Mitchell, J.A., and Ford, J.A., agreed with Harvey, C.J.A. Clarke, J.A., and Lunney, J.A., took a different view on the construction of the Seduction Act (Alberta), 1922, and would have allowed the respondent's appeal. A The respondent then went to the Supreme Court of Canada, where her appeal was allowed. Sir Lyman Poore Duff, C.J., was of opinion that damage actually or presumptively entailing some loss of service or some disability for service is not of the gist of the action under the Seduction Act (Alberta), 1922, s. 5, which gives an unmarried female a right of B action in her own name for seduction. Sir Lyman Poore Duff, C.J., had no doubt that there was sufficient evidence of damage to support the action. In dealing with the submission of the appellant's counsel that the verdict of the jury was against the weight of evidence, he said that it had not been established by argument that the verdict of the C jury on the evidence was one which no jury acting judicially could give. Rinfret and Kerwin, JJ., agreed with him, and Hudson, J., concurred in the result. Davis, J., who dissented, was of opinion that all the provisions of the Seduction Act (Alberta), 1922, including sect. 5, imputed as an essential ingredient of the cause of action an illegitimate child D born or conceived as a result of the relations complained of. Without expressing any opinion as to whether the jury was justified in arriving at its verdict of guilty against the appellant on the evidence, Davis, J., thought that the evidence disclosed no cause of action and that the action should be dismissed. E

Counsel for the appellant invited their Lordships to review the evidence and the summing up by the trial judge with a view to disturbing the verdict of the jury. Their Lordships were not disposed to take this course. They have no doubt that, when special leave to appeal was granted, there was no intention on the part of their Lordships who F heard the application to permit argument on any point except the effect of the Seduction Act (Alberta), 1922, s. 5. The only question which was argued before this Board, therefore, was the construction of the statute. The respondent was not represented, but their Lordships have had the advantage of a full and careful argument by counsel for the G appellant.

The Seduction Act (Alberta), 1922, provides as follows:

> 1. This Act may be cited as the Seduction Act.
>
> 2. The father or, in case of his death, the mother (whether she remains a widow or remarries) of any unmarried female who has been seduced and for whose seduction H the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection may maintain an action for the seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise.
>
> 3. Upon the trial of an action for seduction brought by the father or mother it shall not be necessary to prove any act of service performed by the party seduced but the same shall in all cases be presumed and no evidence shall be received to the contrary; but in case the father or mother of the female seduced had before

> the seduction abandoned her and refused to provide for and retain her as an inmate then any other person who might at common law have maintained an action for the seduction may maintain such action.
>
> 4. Any person other than the father or mother who by reason of the relation of master or otherwise would have been entitled at common law to maintain an action for the seduction of an unmarried female may still maintain such action if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within 6 months from the birth of the child.
>
> 5. Notwithstanding anything in this Act an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded.

These provisions were first enacted as Chapter 8 of the Ordinances of the North-West Territories, 1903, ss. 2, 3 and 4, having been then adopted from legislation in Upper Canada dating from 1837 (7 Will. IV, c. 8) with the addition of sect. 5.

If the language of sect. 5 of the Act is read in its natural and ordinary meaning, and apart from other considerations, an intention to give an unmarried female who has been seduced a right of action in her own name for damages plainly appears. Seduction may well have been thought to be a wrong to the woman from whatever angle it was considered, though there are no doubt cogent reasons for great caution in giving her a remedy for what may be said to be no more than a voluntary loss of chastity.

It is said, however, on behalf of the appellant, that the section must be read as one of a group of sections all of which are dealing only with an action for seduction of the same nature as the action for seduction known to English law. An obvious objection at once suggests itself. The cause of action in English law is the loss of service suffered by the plaintiff, and, though so little proof of the relations of master and servant as scarcely to amount to more than a fiction will suffice to found the action, the action must fail if there be not some evidence. Proof of seduction is an incident, rather than the essence, of the action. All this was pointed out by HARVEY, C.J.A., in the course of his elaborate discussion of the English authorities. If, on the other hand, the woman is to have her own action for her seduction, it is inapposite to speak of loss of service, and it has apparently been supposed in some cases in the provincial courts of Canada that proof of loss of ability to serve takes the place of proof of loss of service as the real ground of the action when brought by the woman herself. Such a modification of the cause of action *per quod servitium amisit* seems to their Lordships, with all respect to the judges who have approved this reasoning, to be unsatisfactory. The action for seduction as known to English law has itself had an unsatisfactory development, as may be seen from *Norton* v. *Jason* (1), to which their Lordships were referred. This was an action on the case for entering the house of the plaintiff and making an assault on his daughter and getting a bastard by her. ROLL, C.J., in ordering the case to be set down for argument, said that the action was brought for the damage done to the master, and he might have an action for the damage caused to him by the battery, and, although the daughter could not have an action, her father might, although not for entering his house, because it was with his leave, nor for assaulting his daughter and getting her with child, because this was a wrong particularly done to her, yet for the loss of her service caused by this he might have an action. In *Eager* v. *Grimwood* (2), the declaration was framed in trespass, thus avoiding the A necessity for proving the loss of service. The action failed, notwithstanding the argument of counsel for the plaintiff that the debauching of the plaintiff's servant, who was his daughter, was an act of trespass, and an invasion of the legal right of the plaintiff, who had a kind of property in her. The decision of TINDAL, C.J., in *Grinnell* v. *Wells* (3) was said B by POLLOCK, C.B., to be precisely in point, where TINDAL, C.J., said, at p. 1041:

> The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the C defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest.

As has been repeatedly said, this is little more than a fiction, and it had the result noticed in the comment appended to the report of the judgment of TINDAL, C.J., and attributed to SERJEANT MANNING D [p. 1044]:

> It may be observed, however, that the *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers.

It may be also observed that it leaves without redress the child herself. E

Their Lordships see no reason based upon the language of sect. 5 for supposing that the legislature did not intend to close the gap and give the unmarried female redress. It was contended that the words which stand at the head of the group of sects. 2, 3, 4 and 5 of the Act—namely, "Persons entitled to maintain action"—support the construction con- F tended for by the appellant's counsel. Their Lordships were also invited to say that light is thrown upon the proper interpretation of sect. 5 by sect. 4, which gives a right of action to a person other than the father or mother in circumstances in which the birth of a child in consequence of the seduction is predicated. These contentions do not commend themselves G to their Lordships. It appears to them that the legislature intended to give a new right of action "in the same manner as an action for any other tort" to an unmarried female who had been seduced. Their Lordships agree with the view, stated in the judgment of SIR LYMAN POORE DUFF, C.J., and adopted by him, that the action under sect. 5 H has nothing to do with the parental relations, nothing to do with the relation of master and servant, and nothing to do with service or loss of service, and that there is no *a priori* probability that sect. 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy or illness directly traceable to the physical act of copulation and giving rise to some disability for service. No such conditions are expressed in sect. 5. Having regard to the construction which their Lordships place upon sect. 5, a construction which seems to them to be the natural and reasonable meaning of the language used, it is unnecessary to examine the numerous authorities in England and in Canada with regard to the action for seduction at common law. For these reasons, their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent did not lodge a printed case and was not represented at the hearing. An appearance was entered on her behalf, however, and such costs as she is entitled to must be paid by the appellant.

Appeal dismissed with costs.

Solicitors: *Charles Russell & Co.* (for the appellant); *Blake & Redden* (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

GREENWOOD *v.* CENTRAL SERVICE CO. LTD. (ST. MARYLEBONE BOROUGH COUNCIL, THIRD PARTIES).

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Tucker, J.), **June 26, 27, 1940.**]

Emergency Legislation—Duty to light streets—Street refuge—Lighting restrictions in street—How far affecting obligation to light obstructions in street—Metropolis Management Act, 1855 (c. 120), *ss.* 108, 130—*Lighting (Restrictions) Order,* 1939 (*S.R. & O.,* 1939, *No.* 1098), *paras.* 1, 4 (*d*).

Highways—Obstructions—Lighting of obstructions—How far duty affected by lighting restrictions.

The driver of a taxicab proceeding through the streets at night during the black-out collided with a bollard on a street refuge. A light had been properly placed on the refuge, but had gone out. It was proved that the local authority responsible for lighting these obstructions in the roadway had appointed officers to attend to these matters, and these officers were assisted by the air-raid wardens. It was contended that the local authority had failed in its statutory duty to light obstructions in the highway:—

HELD: the duty of the local authority was to place a light upon the obstruction and to take all reasonable measures to ensure that that light remained alight. It was not under an absolute duty which would render it liable in damages if the light was found to have gone out or to have been removed without negligence on the part of the authority.

[EDITORIAL NOTE. It may have been thought that the decision in *Wodehouse* v. *Levy* (4) implied that there was an absolute duty on a local authority to place a light upon an obstruction and to insure that that light remained burning at all necessary times. All the members of the court here agree that that would be a mistaken view, and, so long as the local authority takes reasonable precautions to have any failure of the light remedied or reported to it, it fulfils the statutory duty placed upon it. Its only duty is to act without negligence.

AS TO LIGHTING OBSTRUCTIONS IN HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and FOR CASES, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to :

(1) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430 ; 38 Digest 25, *137*.

(2) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502 ; 26 Digest 392, *1190* ; 120 L.T. 470.

(3) *Polkinghorn* v. *Lambeth Borough Council,* [1938] 1 All E.R. 339 ; Digest Supp. ; 158 L.T. 127. A

(4) *Wodehouse* v. *Levy,* [1940] 3 All E.R. 137 ; Digest Supp.

(5) *Great Central Ry. Co.* v. *Hewlett,* [1916] 2 A.C. 511 ; 26 Digest 419, *1383* ; 85 L.J.K.B. 1705 ; 115 L.T. 349 ; *revsg.*, 114 L.T. 713.

APPEAL by the first defendants from a judgment of His Honour DEPUTY JUDGE ELLIOT GORST given in the Bloomsbury County Court B on Apr. 9, 1940. The facts are fully set out in the judgment of MACKINNON, L.J.

Gilbert J. Paull, K.C., and *Montague Berryman* for the appellants.

S. R. Edgedale for the respondents.

C

MACKINNON, L.J. : This appeal is brought by the first defendants in the action, who were held liable to pay damages to the plaintiff, who was a passenger in their taxicab. The driver ran into a bollard on a street refuge at night, and caused the plaintiff damage, so that she sued the company. Having been held liable to pay her a sum of £80, they D brought in the St. Marylebone Borough Council as third parties, claiming that they were joint tortfeasors with their driver, and that under that Act they were liable to contribute towards the damages they had to pay. The plaintiff has dropped out of the proceedings, and this appeal is solely against the decision of the county court judge in favour of the E third parties as between the defendants and them.

The respondents, being a street authority, erected this bollard on an island in the roadway, pursuant to the powers given them by the Metropolis Management Act, 1855, s. 108, which provides as follows :

> It shall be lawful for every vestry and district board from time to time to place F any posts, fences, and rails on the sides of any footways or carriageways in their parish or district, for the purposes of safety . . . and also to place any posts or other erections in any carriageways, so as to make the crossings thereof less dangerous for foot passengers . . .

The complaint of the appellants against the respondents is that, on the night when this accident happened, this bollard or post, being an G obstruction in the highway, was not lighted so as to warn their driver against its existence. Their claim against the respondents is based upon the allegation that it was the duty of the respondents to light that obstruction in the highway.

It is said by counsel for the appellants that the duty to light this H obstruction in the highway arises under the Metropolis Management Act, 1855, s. 130, which provides as follows :

> Every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause [those lamps to be sufficiently lighted and so forth].

If this accident had occurred in times of peace, no doubt that obligation would have been imposed upon the respondents, but under the Lighting (Restrictions) Order, 1939, para. 1, issued by the Secretary of State pursuant to wartime legislation, it was ordered:

> Subject as hereinafter provided, no person shall during the hours of darkness cause or permit [any light to be displayed].

The effect of that order, which had the force of legislation, was to repeal temporarily the obligation imposed upon the respondents by the Metropolis Management Act, 1855, s. 130. That Act having said that they should cause their streets to be well and sufficiently lighted, this order, having the force of a subsequent enactment, forbade them to maintain such lighting at all.

In my view, any duty which the borough council had to members of the public, or to the appellants in this case, under the Metropolis Management Act, 1855, s. 130, disappeared when this statutory order was issued. No doubt, however, there would remain a common law obligation upon the respondents, having erected an obstruction in the highway, to use reasonable care to prevent that obstruction from being a danger to persons using the highway. Counsel for the appellants says that the respondents failed to do that, because, notwithstanding this general prohibition as to showing any lights, there was a qualification of that, and a limited permission to the borough council to light this bollard in a particular way, because the order goes on to provide in para. 4 as to lights in roads:

> Para. 1 of this order shall not apply to the following lights for the guidance of traffic in roads . . . (*d*) lamps indicating obstructions upon or near the carriage-way of any road, provided that they are of candlepower not exceeding one and so screened as to prevent light being thrown upwards and any appreciable glow being produced on the road surface.

It was, therefore, permitted to the borough council to guard against the danger caused by the presence of this post in the highway by providing lamps of that small illuminative power. In fact, pursuant to that permission, the borough council had provided themselves with a great number of hurricane lamps. All round their borough, wherever there were these bollards or posts on the highway on street refuges, they had placed on each of them one of these lamps, and had taken measures to ensure that, when darkness came on, the lamps should be lit. Unhappily, at the moment of this accident, a particular lamp hanging on the front of this bollard into which the taxicab was driven had gone out. It was in evidence before the county court judge that there were great difficulties in keeping those lamps always alight. They were apt to go out. Nevertheless, the borough council had taken steps to guard against that to the best of their ability. They had a lorry which went round with tenders which substituted lighted lamps, and, whenever their servants found that a lamp was out, they replaced it by a lighted one. Unhappily, this accident happened when the lamp had gone out and before it had been seen by the respondents' servants and replaced or relit.

Those being the circumstances, the question is whether or not the appellants can assert that the respondents are under a resulting liability as tortfeasors jointly with themselves causing the damage to the plaintiff. That depends upon whether, as counsel for the appellants so strenuously contended, the obligation of the respondents to light this obstacle was an absolute one or only an obligation to use reasonable diligence and care in the lighting of it. The county court judge has held that the obligation was only to use reasonable care, and was not an absolute obligation. I need not go into the evidence, because his finding of fact binds us, and he has found in fact that there was no negligence on the part of the borough council. He says:

> I cannot find that there was anything else which they could reasonably have done, having regard to the number of lights to which they had to attend and to the conditions in which they had to carry out their duties . . . I find that there was no negligence in their methods of lighting those bollards at that time.

As I have said, apart from any question of negligence or reasonable care, counsel for the appellants has argued that the duty of the respondents to light an obstruction of this sort is an absolute one, and he seeks to derive that from the Metropolis Management Act, 1855, s. 130. I think that that section was temporarily repealed, and, therefore, he can claim against the borough council only for breach of some duty to light the obstruction in the highway outside the obligation of that section. I think that, on the question of the duty of lighting an obstruction of this sort, the obligation of the borough council is only to exercise reasonable skill and care. It is not an absolute duty. Counsel for the appellants tried to rely on the principle which he said arose out of the Factories Acts, where it is provided that dangerous machinery must be fenced. That is an absolute obligation, he said, and it is no answer to say that one has used every possible care and skill to do it. Counsel for the respondents said, however, that that statute does not apply, and that the proper principle is that which was laid down by Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (1), at p. 455. I think with regard to that that counsel for the respondents is right. Lord Blackburn said, at pp. 455, 456:

> For I take it . . . that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised [putting up obstructions in the highway, in this case] if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

Holding, as I do, that the obligation of the borough council was to use reasonable diligence to render this obstacle safe and innocuous, the county court judge having found that they did exercise reasonable diligence, and no negligence having been proved against them, I think that the result is that this appeal fails, and must be dismissed with costs.

LUXMOORE, L.J.: I agree that this appeal should be dismissed. The main question to be determined is what is the duty, if any, of a metropolitan borough council with regard to the lighting of a permanent obstruction caused by a street refuge, or any part of it, in a street, having regard to the relevant provisions of the Metropolis Management Act, 1855, and the Lighting (Restrictions) Order, 1939, made under the defence regulations, imposing restrictions on public lighting.

The question arises in these circumstances. On Oct. 7, 1939, the plaintiff was being driven at night-time along Goodge Street, Tottenham Court Road, in a taxicab belonging to the defendant company. The street was dark, as the black-out was in force. The taxicab ran into a bollard on one of the street refuges, and the plaintiff was injured. She instituted proceedings in the county court against the defendant company, alleging that their servant was negligent, and subsequently in those proceedings she added the Marylebone Borough Council as defendants, alleging that they also were negligent. The negligence alleged against them was that, in breach of their statutory duty under the Metropolis Management Act, 1855, s. 130, they failed to light or to have lit at the time of the collision the obstruction in question. The defendant company issued a third-party notice claiming that, in the event of the court holding that they were liable to the plaintiff, they were entitled to be indemnified by, or have a contribution from, the Marylebone Borough Council under the Law Reform (Married Women and Tortfeasors) Act, 1935.

The county court judge, after hearing the evidence, found that the defendant company were liable for the negligence of their driver, that negligence consisting of the fact that their driver was driving too fast at the moment of the accident, though it is fair to add that he did not think that the driver was seriously to blame. He gave judgment for the plaintiff against the defendant company for £80 and costs on scale C, and for the Marylebone Borough Council against the defendant company, with costs to be paid direct to the Marylebone Borough Council. On the third-party proceedings, he gave judgment for the Marylebone Borough Council with costs.

The defendant company appeal from the whole of this order, and by the notice of appeal they ask that the judgment may be set aside, and that judgment may be entered for them against the plaintiff with costs, or, alternatively, that judgment may be entered in the action for the plaintiff for the sum of £80 with costs against both defendants, or, in the further alternative, that there be a new trial. The appellants have abandoned their appeal from that order so far as it is in favour of the plaintiff, and submitted to their appeal on that head being dismissed with costs in favour of the plaintiff, but they ask that the order of the county court judge be varied by the apportionment of the £80 damages, under the Law Reform (Married Women and Tortfeasors) Act, 1935, between the two defendants, and that the Marylebone

Borough Council be ordered to indemnify the owners of the taxicab in respect of the sum apportioned to the Marylebone Borough Council. The grounds on which the appellants ask for indemnity and contribution are threefold. It is said that the Marylebone Borough Council were guilty of negligence, breach of statutory duty, and nuisance, which caused, or substantially caused, the accident. It is common ground that the lamp attached by the Marylebone Borough Council to the obstruction with which the taxicab came into collision was out when the collision happened. What the county court judge has said about that is this :

> There has been no evidence called before me to show that it [the lamp] had been out for any unreasonable period of time, and that the council had remained indifferent to the fact that it was not alight, or that this was a constant occurrence, or that they in fact permitted any overt act of negligence. The act complained of is allowing it to be out. I cannot find that they at any time were negligent in any way at all. The war had only been in progress, if that is the appropriate word for this war, for some 5 weeks. There is ample evidence that they had taken measures to illuminate, as far as statutory rules and orders in force allowed them, the obstructions or the obstacles in the roadway and to keep these lights going. It is clear that hurricane lamps have a way of going out. The means which the borough council employed—namely, having a lorry with lighted lamps parading the streets, coupled with officers at various posts attending to them, and relying on the valuable assistance of air-raid wardens—seems to me, in the circumstances at that time, to have been a reasonable way of dealing with a difficult situation. I cannot find that there was anything else they could reasonably have done, having regard to the number of lights to which they had to attend, and to the conditions in which they had to carry out their duties. After all, the black-out operated against them and their lorries and their officers just as much as it operated against anybody else. I find that there was no negligence in their method of lighting those bollards at that time.

That is clearly a finding that the Marylebone Borough Council was not guilty of any negligence, and counsel for the appellants very frankly admitted that that was a finding of fact with which he could not quarrel. He argued, however, that the question whether or not there was negligence did not arise, because the Marylebone Borough Council was under an absolute statutory duty to keep the obstruction lighted, and that, if for any reason whatever a light went out without the fault of the Marylebone Borough Council, there was no escape from liability so far as they were concerned. He contended that the statutory duty arose under the Metropolis Management Act, 1855. By sect. 108 of that Act, putting it shortly, power is given to a local authority to erect street refuges in the carriageway. Sect. 130 provides as follows :

> Every vestry and district board [it is now every local authority] shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as such vestry or board may think fit, necessary, or proper ; and all public lamps, and the lamp posts and lamp irons and fittings thereof, to be provided by [any local authority shall vest in such local authority].

It is said that this section imposes an absolute duty to light the obstruction. I do not agree. In my view, the section is aimed at quite a different matter—namely, the provision of a system of street lighting. There is nothing in sect. 108 or in sect. 130 which imposes any duty to put any light upon an obstruction, or to do anything more than keep the street well and sufficiently lighted. I think that that is apparent from the whole structure of sect. 130. The first part of the section says that the local authority is to cause the streets to be well and sufficiently lighted. It then goes on to say what they are to do for that purpose—that is, to set up and maintain lamps, and so on. Then they are to cause these lamps to be lighted and to continue to be lighted. There is no question but that the Marylebone Borough Council had fulfilled their duty under this section before the Lighting (Restrictions) Order, 1939, came into being, nor is there any suggestion that they were not properly maintaining their street-lighting system at that date. We were told that there is no other section in this Act, and no section in any other Act, which has any material bearing on the case, and I proceed on that footing.

The Lighting (Restrictions) Order, 1939, came into force on Sept. 1, 1939. So far as material to this case, para. 1 provides as follows:

> Subject as hereinafter provided, no person shall during the hours of darkness cause or permit [any light to be displayed].

This prohibits the showing of any light, and so plainly absolves the Marylebone Borough Council from any liability to keep the streets in their jurisdiction well and sufficiently lighted under the Metropolis Management Act, 1855, s. 130. This prohibition, however, is expressly stated to be "subject as hereinafter provided." The only material provision to be considered in this connection is, I think, para. 4, which deals with lights in roads, and provides as follows:

> Para. 1 of this order shall not apply to the following lights for the guidance of traffic in roads . . . (*d*) lamps indicating obstructions upon or near the carriageway of any road, provided that they are of candlepower not exceeding one and so screened as to prevent light being thrown upwards and any appreciable glow being produced on the road surface.

That subparagraph, in my opinion, does not impose any statutory duty, but enables the strictness of the order against displaying any light to be departed from in specified cases.

Our attention was called to a number of authorities relating to accidents which happened in similar circumstances in the Great War. In all the cases to which our attention was called, the court dealt with the dispute on the basis of negligence, though reference was made to the statutory duty of the borough council in question to light the streets under its jurisdiction under the Metropolis Management Act, 1855, s. 130. The first case to which our attention was called was *Baldock* v. *Westminster City Council* (2). BANKES, L.J., stated that there were two questions arising on that appeal. The first was whether the local authority were under any duty with regard to lighting a refuge into which the plaintiff's taxi cab had run, and whether, assuming that there was any such duty, there was any negligence on the part of the defendant. On the question of duty, BANKES, L.J., said, at p. 502:

> With regard to the duty, the position appears to be this. The defendants are,

> under the Metropolitan Management Act, 1855, s. 130, under a duty with regard to lighting the streets, and by sect. 108 they have the power conferred upon them of placing fences and posts and arches upon the footways, carriageways, and so forth, and placing posts or other erections in any carriageway so as to make the crossing thereof less dangerous. They have, therefore, under those two sections, power conferred, and a duty imposed, upon them. `Under that power they had the right to erect this particular shelter, and the statute imposes no special duty upon them to light it, but does impose upon them the general duty to cause the streets within their district to be well and sufficiently lighted, and I should say *prima facie* that that duty included a duty to provide sufficient light to indicate the position of any obstructions which they place in the street under the powers conferred upon them by sect. 108.

Then he dealt with the facts of the particular case. It is to be noted that the lighting regulations which had then come into force were not called to the attention of the court. The rest of the judgment deals with the question of whether or not there was negligence on the part of the local authority, they having elected to place a light on the obstruction, and, therefore, BANKES, L.J., said, taken upon themselves the self-imposed duty to keep the obstruction illuminated.

The question of the liability of a metropolitan borough council for failure to light a street obstruction was again discussed in *Polkinghorn* v. *Lambeth Borough Council* (3). The issue to be decided in that case was whether or not the borough council were guilty of negligence in not lighting a particular obstruction. It is true that SCOTT, L.J., in his judgment referred to the statutory duty of the borough council. After referring to the Metropolis Management Act, 1855, s. 130, he said, at p. 342 :

> Under that section, it was clearly the duty of the Lambeth Council to maintain a light, which would prevent one of the obstructions, properly erected under sect. 108 for the purpose of assisting foot-passengers, from being a danger to motor traffic in the road.

Later, having discussed the facts, he said, at p. 343 :

> In those circumstances, my view is that the legal position is a very simple one. It is that, whether one regards the case from the point of view of statutory duty or from the point of view of common law negligence, in either case the failure to maintain the light is all it is necessary for the plaintiff to prove, in order to establish his right to damages, unless after that evidence the defendant council gave affirmative evidence to displace the onus which was put upon them to disprove liability for the accident. In the absence of evidence satisfying the judge that they had been guilty of no fault, and that the cause of the light being extinguished was some cause for which they were not responsible in law, the liability for the accident remained upon them.

It was said by counsel for the appellants that in this passage SCOTT, L.J., decided that there was an absolute statutory duty on a metropolitan borough council to keep lighted an obstruction in the road or street under their jurisdiction. I do not so read the judgment. It must be remembered that there is a clear distinction between an absolute statutory duty and a statutory duty which imposes a liability to take reasonable and proper care. On this point counsel for the respondents referred us to SALMOND ON TORTS, 9th Edn., p. 502 :

> When a duty is created by statute, the breach of which is an actionable tort, it is a question of construction whether the liability is absolute, or depends on wrongful intent or negligence on the part of the defendant. In other words, when

> a statute provides that a certain thing must be done, it is a question of interpretation whether this means that the thing is to be done in all events, or merely that the person upon whom the duty is imposed is to use due care and diligence in the endeavour to perform it, and that if he fails to perform it through no fault of his, he shall be free from liability.

I think that it is plain that the passage which I have just read from the judgment of SCOTT, L.J., is referring to the latter kind of statutory duty, and not to an absolute statutory duty, for SCOTT, L.J., refers in detail to the absence of evidence that the failure to light was due to no fault of the borough council. Further, it is to be observed that, in *Polkinghorn* v. *Lambeth Borough Council* (3), SLESSER, L.J., and FARWELL, J., dealt with the case purely on the ground of negligence.

The latest case dealing with the point is *Wodehouse* v. *Levy* (4). It was said that in that case CASSELS, J., held that there was an absolute duty on the Marylebone Borough Council, under the Metropolis Management Act, 1855, s. 130, to keep any obstruction in the street lighted, and that such absolute duty remained notwithstanding the passing of the Lighting (Restrictions) Order, 1939. As I have already pointed out, there is nothing in sect. 130 imposing any duty to light an obstruction. The duty is to keep the street well and sufficiently lighted. That duty has been abrogated by reason of the provisions of the Lighting (Restrictions) Order, 1939, and the Marylebone Borough Council cannot be liable unless there is some duty to keep the obstruction lighted arising under some other provision, or under the common law. It may be that the decision of CASSELS, J., can be supported on the ground of negligence, because, on the evidence in that case, the Marylebone Borough Council did not in fact make any attempt to provide such a light as is permitted under the Lighting (Restrictions) Order, 1939, para. 4. Be that as it may, I am satisfied that the judge was in error if and so far as he held that there was an absolute duty to maintain a light on an obstruction lawfully erected in a street, so that, if from any cause whatever, and without any fault on the part of the borough council, the light which was provided failed to function, the borough council would be liable.

Putting the duty of the Marylebone Borough Council at its highest in this case, I think that its duty was to supply a proper light of the permitted kind to illuminate the obstruction. There was ample evidence to entitle the county court judge to find, as he did, that the Marylebone Borough Council provided a proper lamp and took all reasonable steps to see that it performed its proper function.

The last point on which counsel for the appellants relied as establishing liability on the part of the Marylebone Borough Council was that the street refuge complained of constituted a nuisance, and, as such, it was the duty of the Marylebone Borough Council at common law either to keep a light upon it or to provide a watchman at night-time to warn persons using the street of its existence. I think that the short answer to this point is that the obstruction was erected by the Marylebone Borough Council under the powers conferred upon it by sect. 108 of the

1855 Act. There is no suggestion that it was not properly erected. Therefore, it cannot be a nuisance at common law. If authority is wanted for that view, I think that it is to be found in the opinions in the House of Lords in *Great Central Ry. Co.* v. *Hewlett* (5). For these reasons, I agree that the appeal fails, and must be dismissed with costs.

TUCKER, J.: I agree. In my view, the circumstances of this case are almost entirely the same as those in *Polkinghorn* v. *Lambeth Borough Council* (3), the only difference being that the accident in that case arose in times of peace. I think that it is clear from the judgment of SCOTT, L.J., which has been referred to by LUXMOORE, L.J., that in that case SCOTT, L.J., was of the opinion that the Metropolis Management Act, 1855, s. 130, did not impose an absolute obligation upon the borough council to light the post in question. It is true that FARWELL, J., based his decision on negligence, but in so doing he expressly stated that he did not mean to differ in any way from the judgment of SCOTT, L.J.

In those circumstance, it appears to me that the Lighting (Restrictions) Order, 1939, has no bearing upon this case, except that it must, no doubt, be taken into consideration in deciding the degree of care which is imposed upon a borough council in the present wartime circumstances when a bollard erected by them is unlighted. I think that *Polkinghorn* v. *Lambeth Borough Council* (3) shows that, where such a bollard is in fact unlighted and causes an accident, the onus of showing how the bollard came to be unlighted is thrown upon the borough council in question. In discharging that onus which is put upon them, it is no doubt very relevant to consider the provisions of the order to which I have referred, which preclude the borough council from doing the most obvious things which would prevent such an obstruction in ordinary times from being dangerous.

I also agree with what LUXMOORE, L.J., has said with regard to *Wodehouse* v. *Levy* (4). On reading that case, I think that it is clear that CASSELS, J., based his decision in part upon the view that sect. 130 of the Act of 1855 did impose upon the borough council an absolute obligation, and I agree that to that extent his decision cannot be supported. I agree that this appeal should be dismissed.

MACKINNON, L.J.: I agree with LUXMOORE, L.J., and TUCKER, J., that, if and so far as CASSELS, J., decided in *Wodehouse* v. *Levy* (4) that there was an absolute duty on the borough council to light this obstacle, I cannot agree with his judgment.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *A. E. Wyeth & Co.* (for the appellants); *William Charles Crocker* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

KERRY v. KEIGHLEY ELECTRICAL ENGINEERING CO., LTD.

[COURT OF APPEAL (MacKinnon, Clauson and Luxmoore, L.JJ.), **June 13, 14, 17, 1940.**]

Negligence—Contributory negligence—Fall down lift shaft—Plaintiff stepping backwards through lift door—Whether entitled to assume presence of lift if door opened.

The plaintiff stepped from a lift to the landing of an upper flat, remained for a few seconds on that landing, during which the lift door closed, and then, according to his own evidence, while keeping his back to the lift, stretched his hand backwards, opened the lift door and stepped backwards through it. The lift was not there, and, in consequence. he fell down the shaft and sustained injuries in respect of which he sued the defendants, the engineers responsible for the installation and maintenance of the lift, for negligence in its construction and maintenance. The trial judge held that the accident had occurred through the fault of the defendants in failing properly to service the lift, whereby the door opened when the lift was not at the floor level. He further held that the plaintiff was entitled to assume that the lift would be in place if the door opened, and acquitted him of contributory negligence :—

HELD : the plaintiff was not entitled to assume that, because the door opened, the lift would be in place, and, therefore, on his own evidence, he had been guilty of contributory negligence in stepping backwards through the lift door. He was, therefore, not entitled to recover.

[EDITORIAL NOTE. The trial judge held that it was proper for anyone to assume that, in the case of a modern automatic lift if the door opened, the lift was at floor level. He founded this upon what had been said in previous cases, but the Court of Appeal have held that an intending passenger in a lift is not entitled to make any such assumption.

AS TO NOTORIOUS FACTS OF WHICH JUDICIAL NOTICE CAN BE TAKEN, see HALSBURY, Hailsham Edn., Vol. 13, pp. 622-624, para. 693 ; and FOR CASES, see DIGEST, Vol. 22, pp. 152-157, Nos. 1297-1338.]

Cases referred to :

(1) *Morgan* v. *Girls' Friendly Society* (*Incorporated Central Council*), [1936] 1 All E.R. 404 ; Digest Supp.

(2) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 ; 36 Digest 37, *213* ; 92 L.J.K.B. 50 ; 128 L.T. 386.

(3) *Steer* v. *St. James's Residential Chambers Co.* (1887), 3 T.L.R. 500 ; 31 Digest 102, *2395*.

(4) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

APPEAL by the defendants from a judgment of ATKINSON, J., dated Apr. 4, 1940. The facts, which were not in dispute, are fully set out in the judgment of MACKINNON, L.J. In the Court of Appeal, the only point of substance was the question of contributory negligence, and, on this question, ATKINSON, J., in the court of first instance delivered judgment as follows :

ATKINSON, J. : I think that everybody of intelligence knows nowadays that automatic lifts, which operate without the necessity for an attendant having to be with them, are supposed to be so constructed that the door will not open unless the lift is there. I think that that is common knowledge now, and people who have anything to do with lifts or use lifts, and, I think, the general public, know that, and have come to rely upon it. Therefore, it is the fact, I think, that to-day, if there is a lift working automatically, and it is in proper working order, it does have the security for the user that, if the door opens, the lift must be there. If the door opens without the lift being there, something has gone wrong, and there is something in the nature of a trap for the user.

I do think the public to-day have a right to expect, and to take for granted, that, if a door of a lift opens, the lift will be there. What did the plaintiff do ? He got on to the landing and saw the door shut. He knew nothing about the existence of lifts which automatically descend in 30 seconds. He was engaged only for a minute, or for a few seconds, perhaps. No bell was rung. There is no bell in some lifts, but, in my block, for instance, the lift does not move until a bell is rung. At any rate, there was nothing to indicate to him that the lift had moved. He said : " I only know what everybody knows—that a door will not open unless the lift is there. I turned and with my left hand pulled it open. I stepped in, slightly more facing out of the lift than in it, substantially sideways." I am asked to find that that was contributory negligence on his part. I cannot do that. I do not think that it was. I think that one has to relise that the danger is a hidden danger until the door is opened. I am going to take the same view as that which HORRIDGE, J., took in *Morgan* v. *Girls' Friendly Society* (*Incorporated Central Council*) (1). There somebody had fallen down a lift and he was suing the building owners. It was held that the building owners were not liable, because they had employed competent people to maintain the lift. However, HORRIDGE, J., dealt also with the question of contributory negligence, and said, at p. 405 : " I ought also to deal with the question of contributory negligence. The plaintiff was not guilty of contributory negligence in assuming that the lift was there. I think the remarks of LORD WRENBURY in *Fairman* v. *Perpetual Investment Building Society* (2), at p. 96 are very much to the point." I think that that is a decision which I ought to follow. I think that here the case is still stronger in favour of the plaintiff than it was there. Believing, as we all believe nowadays, that, if the door is open, the lift must be there, he was entitled so to assume. I repeat that it was a concealed danger right up to the last moment when the door was opened. It is said that, if the lift is there, it will be lighted, but that is a thing he would not know. For the sake of comparison, in the case of the lift in my building, it does not light until one opens the door. The mere fact that it is in darkness tells me nothing. If he had known that, if the lift were there, there would be a light showing on the door, there might have been a stronger case of contributory negligence. However, he did not know that, and he assumed, as I think we would all assume, that, if the door opened, there would be a lift there. I have been referred to *Steer* v. *St. James's Residential Chambers Co.* (3), where again one gets some little guidance as to what a person is entitled to assume. At any rate, I cannot find contributory negligence.

The defendants appealed.

J. W. Morris, K.C., and *R. J. Sutcliffe* for the appellants.

W. H. Cartwright Sharp, K.C., and *G. O. Slade* for the respondent.

MACKINNON, L.J. : This is an action which arises out of an accident to the plaintiff. The plaintiff, who was chauffeur to a man who had a flat somewhere in the north of London, accompanied his master to the entrance to the block of flats, and went up with him in a lift to the landing on to which this flat opened. He and his master emerged from the lift, and either they closed the door, according to their evidence, or it was closed automatically. Anyhow, the door closed. A conversation took place for a moment or two between the master and the chauffeur—merely enough for the master to say, " Will you get me some stamps and some cigarettes ? "—and then the chauffeur was at liberty to return and carry out that behest. He was facing his master, with his back to the lift, and in that position put his hand behind him, opened the door of the lift shaft, and moved backwards through that door. The lift was not there, and the result was that he fell some 21 ft. down the shaft and was injured.

There is no dispute about those facts which I have stated. The plaintiff gave his evidence very fairly and candidly. During his cross-examination, it was summed up thus when he was asked by counsel for the appellants:

> You did not look round ?—No.
>
> You say you went into the lift backwards ?—Yes. The cable of the lift was at my back.
>
> Do you mean that you stepped backwards into the lift well without looking to see whether the lift was there ?—Yes.
>
> If you had looked, you would, of course, have seen that the lift was not there ?—Yes.

Later on, it was suggested to him:

> Of course, somebody might have summoned the lift from another floor ?—Yes.
>
> Why did you not look to see whether the lift was there ?—The interval of time in leaving the lift and returning to it was so short that I just took it for granted that the lift would be there.

In those circumstances, having sustained this injury, the plaintiff brought his action against the defendant company. The defendant company are the engineers who, some 17 months before, had installed this lift for the owners of the flats. After it was installed, an inspection took place on July 2, 1937, and the architect of the building owners signed a document giving particulars of that test:

> The above-mentioned lift has to-day been handed over to us in running order to our satisfaction.

However, the defendant company also entered into what is called a service agreement with the owners of the flats, by which, in very obscure terms, they agreed to pay approximately monthly visits to the flats to inspect the lift and see that it was in proper order.

The plaintiff sued the defendants, the makers of the lift. His case was that there was negligence on their part in the construction or maintenance of this lift for which they were liable to him, and he invoked the doctrine laid down by the House of Lords in *M'Alister (or Donoghue)* v. *Stevenson* (4). There is no doubt that, as designed by the defendants, there was a safety device by which the door from any of the landings of the flats into the lift would not open unless the lift were at that floor. Unhappily, on this occasion the door did open, through some defect in that safety apparatus. The facts were very carefully gone into by the judge, and his explanation of the system is extremely clear. He came to the conclusion that the door did open when the lift was not there because a certain arm, which ought to have fallen outwards when the lift went down, was engaged against the brickwork of the cavity which had been cut in the surrounding brickwork to let it work freely. He came to the conclusion, and expressed it, that there was no impropriety or defect in the original installation of the lift. Then he goes on to consider the terms of the service agreement, and comes to the conclusion that there was negligence on the part of one of the defendants' men, or all of them, when they came to inspect this lift, because they had not noticed that the brickwork recess into which this arm was to work gave it an opportunity, of which the arm availed itself, of getting stuck against the brickwork. I need not pursue that, because, in the view which we take of this case, that aspect of it becomes immaterial. Logically, if this brickwork were not sufficiently opened out, I should have thought that there must have been an impropriety in the original installation, and, if the judge held the defendants liable at all, it would be with regard to that original installation, and not with regard to their duties subsequently under the service agreement.

When we come to appreciate the facts of this case, however, there seems to me to be a much less difficult question, because by para. 4 of the defence it was pleaded as an alternative that there was contributory negligence on the part of the plaintiff. The particulars are these:

> He stepped down into the shaft without looking to see whether the lift was in fact in position, or taking any other precautions against the accident.

Those particulars were fully proved as a fact, and even stronger particulars of the nature of the action of the plaintiff were proved by that passage in his own evidence which I have already read, when he was asked:

> . . . you stepped backwards into the lift well without looking to see whether the lift was there ?—Yes.
>
> If you had looked, you would, of course, have seen that the lift was not there ?—Yes.

Prima facie, a stronger case of contributory negligence on the part of the plaintiff one can hardly imagine, but, upon that part of the case, the judge decided that there was no contributory negligence on the part of the plaintiff. He said:

> I do think the public to-day have a right to expect and take for granted that, if the door of a lift opens, the lift will be there.

In the course of the evidence, he referred to the fact that he himself lived in a flat and was familiar with the fact that the door would not open unless the lift were opposite to it. That may well be within the sphere of judicial knowledge, but, personally, as I live in the country, and not in a flat, this information as to the ways in which lifts are arranged was novel to me. I knew nothing about it. A little later on, the judge says:

> There was nothing to lead him to suppose that the lift was gone.

In fact, as I have already pointed out, there were only a few minutes, if not seconds, between his emerging from the lift and shutting the door and his attempting to re-enter it. In point of fact, however, as it seems to me, the position would have been just the same if the plaintiff had spent two or three hours in the flat and had then come out and opened the door as he did. The judge says:

> There was nothing to lead him to suppose that the lift had gone. He believed,

> as we all believe nowadays, that, if one finds the door open, the lift must be there, and I think that it was something which he was entitled to assume.

The judge also refers to a decision of Horridge, J., in *Morgan* v. *Girls' Friendly Society* (*Incorporated Central Council*) (1), a case where a man fell down a lift shaft. There the judge held that the defendants were not liable, and, therefore, that it was not necessary for him to decide any question about contributory negligence by the plaintiff. Nevertheless, he does say, at p. 405:

> I ought also to deal with the question of contributory negligence. The plaintiff was not guilty of contributory negligence in assuming that the lift was there. I think the remarks of Lord Wrenbury in *Fairman* v. *Perpetual Investment Building Society* (2), at p. 96, are very much to the point.

That really is the authority which is relied on. Lord Wrenbury said, at p. 96:

> The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of "obvious." Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words "reasonable care" are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he would have seen them. For instance: if one step in a staircase or one rung in a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has generally been called a "trap," although if he had stopped and looked he would have seen that the step or rung had been removed.

He emphasises what needs no authority—namely, that the question is whether the plaintiff uses the reasonable care which a reasonable person should exercise. For my part, I do not think that it is possible to assimilate the expectation of a reasonable person that a staircase will have all its stairs in position, or that a ladder will have all its rungs in position, and not have a dangerous gap in it, for which he must look, to a suggestion that, if one opens a door to a lift, one is entitled to assume that the lift is opposite to that door.

For my part, I think that the clear evidence of the plaintiff that he opened this door with his back to it and stepped backwards through it is the clearest admission of the fact that he did not exercise the reasonable care which a reasonable person would have exercised, and, therefore, that the accident was due to his own negligence in so entering through that door. I think, with all respect to the judge, that, on that view of the admitted facts, I must differ from the judge in his conclusion that the accident was not due to any negligence on the part of the plaintiff. If that be so, the defendants succeed in this action, and it becomes unnecessary to express any opinion upon the possibly difficult question of law, which has not been argued, but has been only indicated before us by counsel for the appellants. Upon that, I express no opinion at all. Upon the simpler question of whether the plaintiff brought about this accident by his own lack of care, and whether the defendants did not establish that there was contributory negligence on his part, I think that the appeal succeeds, and, therefore, the judgment ought to be set aside and judgment should be entered for the defendants A with costs.

Clauson, L.J.: Taking, as I do, precisely the same view of this case as that which has been expressed by MacKinnon, L.J., I find it unnecessary to say more than that I agree. B

Luxmoore, L.J.: I also agree.

Appeal allowed. Judgment for the appellants with costs.

Solicitors: *J. H. Milner & Son* (for the appellants); *J. N. Nabarro & Sons* (for the respondent).

[*Reported by* **Derek H. Kitchin, Esq.**, *Barrister-at-Law.*]

SMITH HOGG & CO., LTD. *v.* BLACK SEA AND BALTIC GENERAL INSURANCE CO., LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **April 11, 15, 16, June 24, 1940.**]

Shipping—Charterparty—Unseaworthiness—Due diligence—Loss due to act, neglect or default of master—Ship unseaworthy at commencement of voyage—Unskilful loading of bunkers during voyage—Claim for general average.

The plaintiffs were the owners of a ship chartered to go to Soroka and load timber and carry it to Garston. The charterparty provided that the shipowner should not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part, and that he should not be responsible for loss or damage arising or resulting from any act, neglect or default of the master, mariner, pilot or servants of the shipowner in the navigation or management of the ship. General average was to be settled in London according to the York-Antwerp Rules, 1924, in accordance with English law. While the ship was loading at Soroka, she suddenly took a list to port of 5°. The master then stopped loading and proceeded upon his voyage. Before arrival at his port of destination, he ran short of bunkers, and put in to Stornoway to take in some extra coal. When 16 tons of coal had been taken in, the ship heeled over, and, in order to save her from sinking, she was beached, with the result that a good deal of the cargo was lost and some of it was damaged. It was found as a fact that the ship was unseaworthy upon leaving Soroka, but the experts agreed that the ship could have been bunkered at Stornoway in such a manner as to have brought her back to the upright and to have allowed her to proceed quite safely to Garston and deliver her cargo. The shipowners claimed general average contribution from those interested in the cargo:—

HELD: as the cause of the loss was the unstable and unseaworthy condition of the vessel, which was due to a failure on the part of the owners and master to exercise due diligence, the owners could not recover general average loss.

Decision of Court of Appeal ([1939] 2 All E.R. 855) *affirmed.*

[**EDITORIAL NOTE.** The House of Lords in this case have taken the same view as that taken in the Court of Appeal, and the interesting questions which were discussed in the court of first instance have not arisen.

AS TO GENERAL AVERAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 593-598, paras. 751-755; and FOR CASES, see DIGEST, Vol. 41, pp. 593-598, Nos. 4169-4241.]

Cases referred to:

(1) *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538; Digest Supp.; 103 L.J.P.C. 166; 151 L.T. 549.

(2) *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 377; 41 Digest 473, *3045*; 45 L.J.Q.B. 436; 34 L.T. 677.

(3) *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350; 29 Digest 229, *1858*; 87 L.J.K.B. 395; 118 L.T. 120; *affg.*, [1917] 1 K.B. 873.

(4) *The Europa*, [1908] P. 84; 41 Digest 480, *3129*; 77 L.J.P. 26; 98 L.T. 246.

(5) *Kish* v. *Taylor*, [1912] A.C. 604; 41 Digest 485, *3170*; 81 L.J.K.B. 1027; 106 L.T. 900.

(6) *The Glenfruin* (1885), 10 P.D. 103; 41 Digest 423, *2655*; 54 L.J.P. 49; 52 L.T. 769.

(7) *Steel* v. *State Line S.S. Co.* (1877), 3 App. Cas. 72; 41 Digest 428, *2693*; 37 L.T. 333.

(8) *The Christel Vinnen,* [1924] P. 208; 41 Digest 423, *2654*; 93 L.J.P. 138; 132 L.T. 337; *varying,* [1924] P. 61.

(9) *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.,* [1924] A.C. 100; 41 Digest 428, *2691*; 93 L.J.P.C. 49; 130 L.T. 481.

APPEAL from an order of the Court of Appeal (MACKINNON and DU PARCQ, L.JJ., and MACNAGHTEN, J.), dated May 12, 1939, and A
reported [1939] 2 All E.R. 855, reversing an order of BRANSON, J., dated Nov. 8, 1938, and reported [1938] 4 All E.R. 383. The facts and the arguments are fully set out in the opinion of LORD WRIGHT.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the appellants.

G. St. C. Pilcher, K.C., and *Valentine Holmes* for the respondents. B

VISCOUNT MAUGHAM: My Lords, I had prepared an opinion on this appeal before I had the advantage of reading the opinions of my noble and learned friends, LORD WRIGHT and LORD PORTER. I find in those opinions all the remarks which I had proposed to address to C
your Lordships, and, in order to save your Lordships' time, I merely say that I agree with those opinions and with the necessary conclusion that this appeal must be dismissed with costs.

LORD WRIGHT: My Lords, my noble and learned friend LORD D
ATKIN requests me to say that he has read in print the opinion which I am about to deliver, and agrees with it.

My Lords, the appellants, who are owners of the steamship Lilburn, claimed in the action a general average contribution from the respondents, who, for purposes of the case, are treated as standing in the shoes of the E
charterers, Exportles Moscow, under a charterparty, dated July 24, 1935. The respondents resisted the claim, on the grounds that the Lilburn was unseaworthy on sailing from the loading port Soroka, that the appellants had not exercised due diligence to make her seaworthy, and that the average act was occasioned by the unseaworthiness, as also F
was the loss of, and damage to, cargo, for which they counterclaimed. BRANSON, J., who tried the case in the Commercial Court, decided in favour of the appellants, but his decision was reversed by the Court of Appeal. Both courts decided that the steamship was unseaworthy on sailing and that the appellants had not exercised due diligence to make G
her seaworthy, but, whereas BRANSON, J., held that the unseaworthiness did not cause the loss, the Court of Appeal held that the cause of the disaster was the unstable and unseaworthy condition of the vessel, which was due to a failure to exercise due diligence.

There are thus concurrent findings on the fact of the unseaworthiness. H
This House is not debarred from re-opening, and, if so advised, reversing, concurrent findings of facts of the courts below, though it will always treat such findings with respect. In the present case, after carefully considering the evidence, I have come to the conclusion that there is no ground for differing from the findings of the courts below. I shall state

very shortly why I agree with these findings. The charterparty provided for the loading at Soroka of a full and complete cargo of wood goods, including a deck load not exceeding what the vessel could reasonably stow and carry, to be delivered at Garston. Of the other conditions contained in the charterparty it is only necessary to refer to certain exceptions set out in cl. 12, in particular that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy, and also that the shipowner should not be responsible for loss or damage arising from (amongst other things) act, neglect or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. General average, if any, was to be settled in London according to the York-Antwerp Rules, 1924, in accordance with English law.

The Lilburn loaded at Soroka 703,111 St. Petersburg standards of timber, of which 255,232 were on deck. The master shut out about 9 standards, because, as the judge found, instability had already manifested itself by the vessel listing about 5° to port during the loading of the last few slings of cargo. The Lilburn sailed with that list. On sailing, she had no appreciable metacentric height. Indeed, she had, it seems, a small negative metacentric height. The weather on the voyage was not exceptional, the highest force of wind being force 7 on two days, but, as the voyage went on, the port list increased to 8° or 9°, and, 2 days after that happened, she went over to starboard with a list of 7°, which increased to 12°, then to 15°, and then to 17°, which was her condition when she put into Stornoway to replenish her bunkers, of which she had then only 4 tons left. She had started from Soroka with insufficient bunkers, and was in that respect unseaworthy, but no point has been made of this, and I ignore it. On entering Stornoway to coal, the forepeak was pumped out, as she was considerably down by the head. That obviously would increase her tenderness. In order to bunker, she was moored with her port side alongside a coal hulk. No deck cargo was removed before bunkering. When about 16 tons had been put into her bunkers, which was done as nearly as possible in the midship section of the ship, she started to come upright. She then went over to port, and, when the port list had reached about 25°, water poured into her, and eventually she lay on her beam ends. Her crew had to leave her. She was put on the beach with the help of tugs. The deck cargo was discharged, portions were lost or damaged, but the balance was reshipped, and she was towed to Garston with the rest of her cargo, some of it being in a damaged condition.

There was some conflict of expert evidence, but it seems clear that the deck cargo rendered the vessel unstable and too tender for the voyage. It is true that she could not sink, because the timber would keep her afloat, but she was liable to fall, as she did in fact, on her beam ends, and become a derelict. She was clearly unfit to carry and deliver the cargo safely, and her condition endangered the lives of the crew. She was unseaworthy on any definition of the term. It was sought to say that the disaster at Stornoway was due to the act of the master in putting in the bunkers as he did, and in pumping out the forepeak. It was said that his action in these respects was negligent, and, also, it may be, that he began to bunker her without discharging or reducing the deck A cargo. There is no clear finding that the master was negligent, but, whether he was negligent or not, what he did could have done no harm if the Lilburn had not been unseaworthy. The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner B to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect, such an exception can excuse only against latent defects. The overloading was the result of overt acts.

On these facts, BRANSON, J., decided in favour of the appellants. C Though he held that the vessel was unseaworthy and the warranty had been broken, the unseaworthiness did not, in his opinion, cause the loss. He held that the necessary *nexus* between the unseaworthiness and the disaster was absent, because, in his opinion, the vessel could have been bunkered at Stornoway in such a manner as to bring her back D to upright and enable her to proceed and deliver her cargo at Garston. He distinguished *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* (1), on the ground that there the defect could not have been remedied during the voyage. He held that the accident took place, not by reason of the unseaworthiness of the ship, but by reason E of the acts of the master, which were wrong in the circumstances, and held that the appellants were entitled to succeed by reason of the exception in cl. 12, " act, neglect or default of the master." He did not in terms find that the master was negligent, though perhaps that is implied. Earlier in his judgment, however, he had described the putting F on board of the 16 tons as done " in a very ordinary way."

This decision obviously raised a very important question of mercantile law. It was reversed by the Court of Appeal. MACKINNON, L.J., in giving the leading judgment, agreed with the finding of BRANSON, J., on the issue of unseaworthiness. He held that the cause of the disaster G was clearly due to the unstable condition of the vessel on sailing from Soroka, which had continued right up to the disaster, and all that could be said about the master's conduct at Stornoway was that his act or default conduced to the disaster, either by his not doing something, or by his doing something which might have been done differently, to H prevent the disaster, either in pumping out the forepeak or in putting in the bunkers as he did. In his opinion, the test to apply (following *Kopitoff* v. *Wilson* (2), at pp. 379, 380), was this [p. 862]:

> Although the disaster at Stornoway would not have happened but for the fact that coals were being loaded with the forepeak pumped out, yet it is to be con-

> sidered as caused by the unfitness if [the jury] think that the vessel would not have capsized had she sailed in a fit state from Soroka.

He held, accordingly, that the appellants could not recover in respect of the general average loss and expense, but were liable on the counterclaim. DU PARCQ, L.J., concurred, but he doubted what the proper answer would have been if, there having been a clearly negligent act on the part of the master, coupled with unseaworthiness, the question was whether the loss was caused by the former or by the latter, or by both. He thought, however, that the conduct of the master was perfectly excusable. MACNAGHTEN, J., gave no separate judgment. I agree with the statement of the law by MACKINNON, L.J., but, in view of the considered opinion of BRANSON, J., I feel it desirable to state in my own way how I regard this question of law, which is fundamental in regard to the sea carriage of goods. I do not, with respect, share the doubts of DU PARCQ, L.J., which I think are really inconsistent with the reasoning of MACKINNON, L.J.

Counsel for the appellants has strenuously contended that the master's action, whether or not negligent, was a *novus actus interveniens*, which broke the *nexus* or chain of causation, and reduced the unseaworthiness from a *causa causans* to a *causa sine qua non*. I cannot help deprecating the use of so-called Latin phrases in this way. They only distract the mind from the true problem, which is to apply the principles of English law to the realities of the case. *Causa causans* is supposed to mean a cause which causes, while *causa sine qua non* means, I suppose, a cause which does not, in the sense material to the particular case, cause, but is merely an incident which precedes in the history or narrative of events, but as a cause is not in at the death, and hence is irrelevant. English law can furnish in its own language expressions which will more fitly state the problem in any case of this type. Indeed, the question what antecedent or subsequent event is a relevant or decisive cause varies with the particular case. If tort, which may in some respects have its own rules, is put aside and the inquiry is limited to contract, the selection of the relevant cause or causes will generally vary with the nature of the contract. I say cause or causes, because, as LORD SHAW pointed out in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (3), at p. 369, causes may be regarded, not so much as a chain, but as a network. There is always a combination of co-operating causes, out of which the law, employing its empirical or commonsense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case. That this is the test of the significance of an event from the standpoint of causation is clearly illustrated by this very doctrine of seaworthiness and its relation to kindred questions of negligence as applied to the two maritime contracts, marine insurance and sea carriage of goods. In the former, unseaworthiness is a condition precedent (at least in voyage policies), and, if not complied with, the insurance never attaches. In carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss, as was held in *The Europa* (4) and in *Kish* v. *Taylor* (5). Again, in marine insurance, negligence causing the loss does not in general affect the assured's right to recover. In carriage of goods by sea, in the absence of valid and sufficient exceptions, the shipowner will be liable for a loss occasioned by negligence. Apart from express exceptions, the carrier's contract is to deliver the goods safely. When the practice of having express exceptions limiting that obligation became common, however, it was laid down that there were fundamental obligations, which were not affected by the specific exceptions, unless that was made clear by express words. Thus, an exception of perils of the sea does not qualify the duty to furnish a seaworthy ship or to carry the goods without negligence: *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat-Producers, Ltd.* (1). From the nature of the contract, the relevant cause of the loss is held to be the unseaworthiness or the negligence, as the case may be, and not the peril of the sea, where both the breach of the fundamental obligation and the objective peril are co-operating causes. The contractual exception of perils of the seas does not affect the fundamental obligation unless the contract qualifies the latter in express terms.

To consider these rules, in relation to unseaworthiness, I think that the contract may be expressed to be that the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate if unseaworthiness is a cause, or, if it is preferred, a real, or effective or actual cause. The law is correctly stated, I think, by CARVER ON CARRIAGE OF GOODS BY SEA, 4th Edn., s. 17, which was the last edition revised by the author. The words of the section are as follows:

> And further, the shipowner remains responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage, and if the loss could not have arisen but for that unseaworthiness . . . If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused, either at common law or express contract, have contributed to cause the loss.

The author relied for that proposition, not only on *Kopitoff* v. *Wilson* (2), cited by MACKINNON, L.J., but also on *The Glenfruin* (6) and *Steel* v. *State Line S.S. Co.* (7). In truth, unseaworthiness, which may assume, according to the circumstances, an almost infinite variety, can never be the sole cause of the loss. At least, I have not thought of a case where it can be the sole cause. It must always, I think, be only one of several co-operating causes. The importance, to my mind, of the statement in CARVER ON CARRIAGE OF GOODS BY SEA is that it uses the indefinite article, " 'a' cause," and not the definite article, " 'the' cause." In this connection, I can draw no distinction between cases where the negligent conduct of the master is a cause and those where any other cause, such as perils of the seas or fire, is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case—namely, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action ? There is precise authority for this in the judgment of the Court of Appeal delivered by that great authority on mercantile law, Scrutton, L.J., with the concurrence of Bankes and Atkin, L.JJ., in *The Christel Vinnen* (8). Cargo in that case was damaged by leakage through a leaky rivet. The damage might have been checked but for the negligence of the master in not detecting the water in the hold and pumping it out. It was held (notwithstanding an exception of negligence) that the shipowners were responsible for the whole of the damage, and not merely for such proportion as must have been incurred before the inflow of water could have been checked. No distinction was drawn between damage due to perils of the seas alone and that due to perils of the seas and to negligence combined. Scrutton, L.J., said, at p. 214 :

> The water which entered and did the damage entered through unseaworthiness ; its effects when in the ship might have been partially remedied by due diligence, which the shipowner's servants did not take. But in my view the cause of the resulting damage is still unseaworthiness . . . here the man who has by his original breach of contract caused the opportunity for damage has by the negligence of his servants increased it. He cannot show any exception to protect him, and cannot show that the dominant cause of the damage was not the unseaworthiness which admitted the water into the ship.

I think that this can be as truly said of negligence in acting as in omitting to act. If I may, however, venture to criticise the language of Scrutton, L.J., I should prefer to avoid the word " dominant " which he takes from the marine insurance cases cited by him, in which it is necessary to find the *causa proxima* or dominant cause. This results by reason of the special character of that contract, where the liability to pay depends, broadly speaking, on the casualty being caused directly by the happening which the contract stipulates to be the event on which the indemnity becomes exigible. There may be, in marine insurance cases, a competition of causes, so that it is necessary to determine which event is the dominant cause. Negligence is not material, nor, in time policies, is unseaworthiness material, nor is it material, in one sense, in other classes of marine policies from the point of view of causation, since, if the warranty is not complied with, the risk never attaches. In cases, however, of the sea carriage of goods, the liability depends, in the words of Scrutton, L.J., on a " breach of contract "—that is, to provide a seaworthy ship. The sole question, apart from express exception, must then be : was that breach of contract a cause of the damage ? It may be preferred to describe it as an effective or real or actual cause, though the adjectives, in my opinion, in fact add nothing. If the question is answered in the affirmative, the shipowner is liable though there were other co-operating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or omissions of the master, whether negligent or not, or a combination of both kinds of cause. I think that this was also the view of LORD ATKINSON in the curious case of *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.* (9), where the vessel was held to be unseaworthy because the master had not been furnished with instructions as to special dangers which her design involved. The ship was lost because the master, being uninstructed, made a manœuvre which caused her to capsize. He would not have done so if he had been instructed as he ought to have been. However, LORD ATKINSON said, at p. 120:

> There is nothing to show that what actually occurred would not appear to a competent seaman, properly instructed, to be the thing which would most probably occur under the circumstances. The evidence, I think, establishes that the master's handling of his ship amounted to gross and flagrant mismanagement for which there was no excuse.

He went on to hold that, all the same, the shipowners were responsible. The loss resulted from the unseaworthiness. In that case, as in other cases, including the present case, the right to rely on the exception of negligence was conditional on due diligence on the part of the owners to make the ship seaworthy, which the owners had failed to exercise. I refer to this authority in support of the conclusion that "a" cause of the loss was the unseaworthiness, notwithstanding the intervening negligence of the master. In cases of the type now being considered, the negligence, if any, must almost inevitably occur in the course of the voyage, and must thus intervene between the commencement of the voyage, when the duty to provide a seaworthy ship is broken, and the actual disaster. I doubt whether there could be any event which could supersede or override the effectiveness of the unseaworthiness if it was "a" cause. This is clearly so in the facts of this case. The acts of the master in bunkering as he did and in pumping out the forepeak, whether negligent or not, were indeed more proximate in time to the disaster, and may be said to have contributed to the disaster, but the disaster would not have arisen but for the unseaworthiness, and hence the shipowners are liable. In my opinion, the judgment of the Court of Appeal was correct, and should be affirmed. The appeal should be dismissed with costs.

LORD PORTER: My Lords, I am authorised by my noble and learned friend LORD ROMER to say that he concurs in the opinion which I am about to deliver.

My Lords, the appellants were at all material dates owners of the steamer Lilburn. On July 24, 1935, they entered into a charterparty with Exportles Moscow as charterers for the loading at Soroka in the White Sea of a timber cargo, to be loaded both under and on deck, for carriage to Garston. In the course of the voyage, the ship and cargo incurred a loss for which her underwriters were responsible. The respondents are those underwriters, and entered into an average guarantee on Dec. 24, 1935, for payment of any contribution to general average and/or salvage and/or special charges on cargo which might be ascertained properly to be due in respect of the cargo. On that guarantee the appellants sued the respondents, claiming a sum of £3,325 2*s.* 1*d.*, and in that action, by arrangement between the parties, the respondents were admitted to counterclaim for loss of and damage to cargo said to amount to £1,740 10*s.* 5*d.* In so counterclaiming, the respondents were treated as standing in the position of the holders of the bills of lading. No question as to the amount recoverable is raised in the present appeal.

The charterparty provided for the loading at Soroka of a full and complete cargo of wood goods, including a deck load not exceeding what the ship could reasonably stow and carry. The exceptions clause, cl. 12, provided that the shipowner should not be liable for loss or damage arising or resulting from unseaworthiness, unless the cause be want of due diligence on the part of the shipowner to make his ship seaworthy, and, *inter alia*, that the shipowner should not be responsible for loss or damage arising from the act, neglect, or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. By cl. 13, the vessel had liberty to call at any ports in any order for fuel, and, by cl. 22, it was provided that general average, if any, should be settled in London according to York-Antwerp Rules, 1924, in accordance with English law.

The Lilburn loaded a cargo of 703,111 St. Petersburg standards of wood goods, of which 255,232 were carried on deck. The loading was completed and the ship sailed on Sept. 5, but on the previous day the master shut out some 9 standards. His reason for so doing was found by the judge who tried the case to be due to the fact that the vessel was unstable, and had by that time listed about 5° to port. On sailing, the Lilburn had 154 tons of bunker coal on board, and she was found by the judge even at that time to have had either no metacentric height or even a small negative metacentric height. The weather which she encountered on her voyage was not abnormal. It was, as the chief officer said, the type of weather one would expect on that voyage at that time of year. Owing, however, to her original instability and to the consumption of bunkers, her list increased to 8° or 9° to port until Sept. 10, when some of the deck cargo was re-stowed under deck in an endeavour to counteract the instability. Nevertheless, on Sept. 12 she heeled over from port to starboard, taking a list of 7°. By Sept. 14, this list had increased to 12°, when the forepeak was pumped up to 15 ft. in order to improve the situation and counteract the effect of the consumption of coal from the cross-bunkers. In spite of these precautions, the list increased to 15°, and ultimately to 17°. As she had not enough coal on board to carry her to Garston, she put into Stornoway, intending to take on board an additional 50 tons of bunkers. At that time, she had only some 4 tons left. On entering the harbour, the forepeak tank was pumped out in order to improve her steering, which had become difficult by reason of the fact that she was down by the head. She was then moored alongside a coal hulk, and, in an attempt to counteract the list, the coal which was being taken on board was directed, though perhaps not with complete success, to the port side. Whilst the coal was being taken on board, the ship gradually decreased her list to about 9°, until about 16 tons had been shipped. She then suddenly took a heavy list to port, until she reached some 25°, when water came into the engine and bunker space, causing her to go over on to her beam ends. In this condition she lay, with her masts broken or carried away, and her crew had to leave her. Thereafter she was beached and her deck cargo discharged. Finally, she was towed to Garston, with the rest of her cargo on board but partly damaged. The expenses so incurred were the subject of the general average claim, and the damage to the cargo was the subject of the counterclaim.

To test the question of liability, an action was brought in the High Court of Justice and transferred to the Commercial List, where it was tried before BRANSON, J. It was admitted that, if the loss was caused for any reason for which the shipowners were responsible, the appellants were not entitled to recover any sum for general average, and were liable for the damage done. The respondents contended that, when the Lilburn left Soroka, she was unseaworthy, and that that unseaworthiness was due to want of due diligence on the part of the appellants. In reply, the appellants denied that the ship was unseaworthy, and alleged that the loss was caused, not by unseaworthiness, but either by perils of the seas or else by the negligence of the appellants' servants. No point appears to have been taken in the courts below, nor was it contended in your Lordships' House, that, if the ship was unseaworthy, that unseaworthiness was not caused by want of due diligence on the part of the appellants. It was accepted that the diligence required was that of the owner, his servants or agents. It was strenuously contended, however, that the vessel was not in fact unseaworthy. It was said that in a timber ship the absence of metacentric height, or even the existence of negative metacentric height, did not make the vessel unseaworthy, that, owing to the presence of the deck cargo, she would take a list appropriate to make that height either positive or at least not negative, and that the fact that her instability might make her list from side to side was a matter of no consequence. No court has accepted this view, and it appears to be common ground that, in the condition in which she sailed, and with the necessary consumption of bunkers, her negative metacentric height was bound to increase gradually, and in fact did increase, until it reached 4 ins. Whatever may be the case, where a timber-carrying vessel sails with a list, due to the fact that her cargo carried is heavier on one side than on the other, I cannot take the view that a ship which has a large negative metacentric height, and is, therefore, so unstable that the placing of a comparatively small additional weight either to port or starboard causes her to list suddenly and violently from one side to the other, is in a seaworthy state. In the present case, the shipment of some 16 tons of coal at the bottom of the cross-bunker, possibly near the centre of the ship, and at worst on the port side, was enough to cause so violent a change. Less stability may well be called A for in a ship carrying a timber cargo than in vessels engaged in other trades, but I cannot think that so great an absence of metacentric height, actual or potential, is justified. For these reasons, I am clearly of opinion that the ship was unseaworthy, and that her unseaworthiness was due to the failure of the owners to take proper steps. Nor can it B be said that, in bringing about this disaster, the master was at fault. The appellants' own expert witness, Dr. Telfer, said in evidence:

> In our profession we find it rather difficult for the layman to visualise just why because a ship is listing this way, it is not the correct thing to do to put weights on that side. Any layman can be forgiven for trying that side first. I am quite C sure that even naval architects who have experience of that particular problem would answer the wrong way were they caught unawares.

The appellants say, however, that they are protected by the exception of perils of the sea, and that, even though the ship was unseaworthy, the unseaworthiness did not cause the loss. To this argument the D judge acceded, but his view was reversed by the Court of Appeal. The argument was put thus: that the ultimate cause of the loss was the act or acts of the master, either in pumping out the tank or in shipping the coal on the port side, or both. No doubt those who are either defending themselves or putting forward a counterclaim based upon an E allegation of unseaworthiness must prove that the loss was so caused. Here, however, I think that the loss was uncontestably due to the inability of the ship to take in bunkers by a method which would have been both safe and usual in the case of a seaworthy ship. It was not the coaling which was at fault, nor the method adopted. It was the F fact that that coaling took place and that that method was adopted in a tender ship. If a vessel is to proceed on her voyage, bunkers must be shipped, and, though in one sense the change of balance caused by taking in bunkers was responsible for the accident to the Lilburn, it was not the dominant cause, even if it be necessary to show what the dom- G inant cause was. The master merely acted in the usual way, and, indeed, exercised what he thought was exceptional care in diverting the coal shipped towards the port bunker. In a seaworthy ship, his action would have been a safe one. It was the instability of the ship which caused the disaster.

H In such circumstances, it is unnecessary to decide what would be the result if the loss were attributable partly to the coaling and partly to the unseaworthiness, or to determine whether the fact that the unseaworthiness was a substantial cause, even though some other matter relied upon were a substantial cause also, would be enough to make the owners liable for failure to use due care to make the vessel seaworthy.

I agree with all your Lordships in thinking that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, West Hartlepool (for the appellants); *Ince, Roscoe, Wilson & Glover* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

SOTHERN-SMITH *v.* CLANCY.

[King's Bench Division (Lawrence, J.), **May 29, 30, June 6, 1940.]**

Income Tax—Annuity payments—Contract to make annual payments in consideration of single premium—Aggregate of annual payments not to amount to less than amount of premium—Annuitant dying before receiving payments to amount of premium—Annuity payments continued to third person—Whether capital or income in hands of third person.

In consideration of the appellant's brother paying to a life assurance society a single premium of $65,243.22, the society undertook to pay him an annuity of $6,510, the aggregate of annual payments not to amount to less than the capital invested, with a guarantee that, if at his death the annual sums paid did not equal the capital invested, the society would continue payments of the annuity to the appellant until the amount of the capital invested had been equalled. The brother died after $26,040 had been paid, and the society continued to make the appellant annual payments of $6,510:—

Held: the contract contemplated that the capital invested should be refunded in any event, and it could make no difference that there was no pre-existing debt. The annual payments to the appellant were, therefore, capital.

[EDITORIAL NOTE. Sums paid by way of annuity are generally in the nature of income. The sums dealt with in the present case are only those which, after the death of the first-named annuitant, are contracted to be paid in order that the capital invested by the payment of the single premium shall be repaid. It was not necessary in this case to consider the payments to the first-named annuitant, but only such payments as might have to be made after his death to ensure the complete return of the capital invested. Such payments are held to be payments in the nature of capital.

As to Annuity Payments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380; and for Cases, see DIGEST, Vol. 28, pp. 66, 67, Nos. 340-350.]

Cases referred to:

(1) *Perrin* v. *Dickson*, [1930] 1 K.B. 107; Digest Supp.; 98 L.J.K.B. 683; 142 L.T. 29; 14 Tax Cas. 608; *affg.* [1929] 2 K.B. 85.

(2) *Inland Revenue Comrs.* v. *Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.

(3) *Dott* v. *Brown*, [1936] 1 All E.R. 543; Digest Supp.; 154 L.T. 484.

(4) *Foley (Lady)* v. *Fletcher* (1858), 3 H. & N. 769; 28 Digest 65, *336*; 28 L.J.Ex. 100; 33 L.T.O.S. 11.

(5) *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315; 28 Digest 6, *13*; 51 L.J.Q.B. 626; 45 L.T. 145; 1 Tax Cas. 287.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts and arguments are fully set out in the judgment.

Cyril King, K.C., and *N. E. Mustoe* for the appellant.

A *The Attorney-General* (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: The question in this case is whether certain payments made to the appellant by the Equitable Life Assurance Society of the B United States (to which I will in future refer as the society) under a contract called a refund annuity entered into between the appellant's brother and the society are annuities within the meaning of the Income Tax Acts and taxable as such. By agreement, the case was argued before me on the footing that the appellant was entitled to sue upon the contract, C this having been the basis on which the case proceeded before the commissioners. It appears from the authorities cited that annuities or annual payments, whether for life or for terminable periods, may be either of a capital or of a revenue nature: *Perrin* v. *Dickson* (1), *Inland Revenue Comrs.* v. *Ramsay* (2) and *Dott* v. *Brown* (3). It is necessary, therefore, D to consider whether the payments in question are of a capital or of a revenue nature, and that can be discovered only from the true construction of the contract.

The substance of this contract was that, in consideration of the appellant's brother paying a single premium of $65,243.22, the society E would pay him an annuity of $6,510 during his life, and would guarantee that, on his death, if the sum then paid was less than the premium, they would pay to his sister or his widow the difference in annuities of the same amount. In form, the contract is called a "refund annuity with continuation of payments until capital invested has been returned," F and it guarantees:

> . . . a return which may be more but cannot be less than the amount of the capital invested.

The provisions describe the premium as "capital invested," and the guarantee provides as follows:

> G Guarantee: It is hereby expressly agreed that, upon the death of the annuitant, while this contract is in force, if the sum of the payments previously made by the society is less than the aforesaid capital invested, the society will continue payments under this annuity to his sister, Eva Mary Smith, if living; if not living, to his wife, Julia Marlowe Sothern, beneficiary (with the right on the part of the annuitant to change the beneficiary) until the total amount of the payments made under this contract shall equal the amount of the aforesaid capital invested. If the annuitant H and beneficiary should both die before the sum of the payments made by the society equals the amount of the capital invested, subsequent payments as they fall due hereunder shall be made to the executors, administrators or assigns of the last survivor of the annuitant and beneficiary. If, upon the death of the annuitant, the sum of the payments already made by the society equals, or exceeds, the amount of the aforesaid capital invested, then this contract shall terminate with the last annual payment due prior to the death of the annuitant.

On behalf of the appellant, it was contended that the sums in question were capital, and not revenue, payments, and, therefore, not annuities within the meaning of the Income Tax Acts, because the capital invested must be returned in any event, and reliance was placed upon *Foley* (*Lady*) v. *Fletcher* (4) and *Perrin* v. *Dickson* (1).

On behalf of the respondent, it was contended that the contract provided for a terminable annuity to the appellant combined with a life A annuity to the appellant's brother, that the fact that the terminable annuity was measured by the sum paid by the appellant's brother did not prevent the payments to the appellant from being annuities of a revenue nature, and that, because no debt pre-existed the contract and no property was sold, there was no presumption that the payments B were repayment of capital, and reliance was placed upon *Coltness Iron Co.* v. *Black* (5), while *Perrin* v. *Dickson* (1) was distinguished, on the ground that there the repayment which was held to be capital was upon a failure of the object of the insurance, whereas in the present case there had been no failure, since the appellant's brother had enjoyed the C annuity for several years.

In my opinion, it is clear that the contract contemplated that the capital invested should be refunded in any event. That is the form and that is the substance of the contract. It can make no difference that there was no pre-existing debt. In the case of a contemporaneous D loan repayable in instalments, there is no pre-existing debt. The only question is whether or not the contract creates a debt which is repayable. As WATSON, B., said in *Foley* (*Lady*) v. *Fletcher* (4), at pp. 784, 785:

> . . . an annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted E into an annuity.

As ROWLATT, J., while approving the *dictum* of WATSON, B., said in *Perrin* v. *Dickson* (1), at p. 88:

> . . . the substance of the present transaction is that the appellant does not really F adventure his capital at all.

In my opinion, there is nothing inconsistent with these observations in the *dicta* of the Lord President in *Coltness Iron Co.* v. *Black* (5), at pp. 307, 308. Here the capital never ceased to exist, nor did the appellant's brother ever adventure it, for the contract in express terms G guarantees that the capital invested shall be refunded or returned, and the payments in question have been made in performance of that guarantee. The argument for the Crown that the payments to the appellant are merely measured by the amount paid by the appellant, and are not a refund thereof, appears to me to be highly artificial, and H to give no meaning to the very name of the contract—namely, "refund annuity"—or to the words "with continuation of payments until capital invested has been returned."

It is unnecessary for me to decide whether the sums paid to the appellant's brother were capital or revenue. What I decide is that the payments to the appellant were capital. The appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors: *Scott & Son* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BROADSTAIRS PICTURE HOUSE, LTD. *v.* LITTMAN.

[CHANCERY DIVISION (Bennett, J.), **July 9, 1940.**]

Emergency Legislation—Taking possession of property—Purchaser in possession of property contracted to be sold—Order for specific performance—Failure of purchaser to obey order—Application by vendors for possession of property—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (1).

The purchaser of certain property, under a contract dated Dec. 31, 1938, had paid a deposit on the purchase price, which was paid to a stakeholder, and gone into possession. He failed to complete on the date fixed for completion, and the vendors obtained a decree in an action for specific performance. The purchaser having failed to comply with the decree, the vendors later moved the court for an order for rescission of the agreement, forfeiture of the deposit and vacant possession of the property. The purchaser contended that he was protected by the Courts (Emergency Powers) Act, 1939. It was conceded that the case was not within sect. 1 (2), but it was contended that it was within sect. 1 (1) of the Act:—

HELD: (i) there was nothing in the remedy sought by the plaintiffs in the nature of enforcing a judgment or order for the payment or recovery of a sum of money, and the case did not fall within the Courts (Emergency Powers) Act, 1939, s. 1 (1).

(ii) the plaintiffs could give a good discharge for the deposit in the hands of the stakeholder.

[**EDITORIAL NOTE.** The subsection of the Courts (Emergency Powers) Act, 1939, which at first sight seems appropriate to the facts of the present case is sect. 1 (2), but it was held in *S. & A. Services, Ltd.* v. *Dickson* (1) that that section was confined to remedies out of court, more usually known as self-help. It was sought, therefore, to bring the matter within sect. 1 (1), but it is held that that subsection has no application, in the circumstances of this case.

AS TO THE COURTS (EMERGENCY POWERS) ACT, 1939, s. 1 (1), see BUTTERWORTHS' EMERGENCY LEGISLATION, Statutes Volume, p. 206.]

Case referred to:

(1) *S. & A. Services, Ltd.* v. *Dickson,* [1940] 3 All E.R. 98; Digest Supp.

MOTION for an order for forfeiture of deposit and recovery of possession. The facts and the terms of the motion are fully set out in the judgment.

A. G. Coulson for the plaintiffs.

L. M. Jopling for the defendant.

BENNETT, J.: This is a motion by the plaintiffs, the vendors in an action for specific performance, who have obtained a decree for specific performance. The motion is for an order that the agreement, dated Dec. 31, 1938, mentioned in the order herein, dated Dec. 18, 1939, be

rescinded and that the deposit of £500 paid thereunder be forfeited to the plaintiffs and that the defendant be ordered, within 14 days of the order to be made hereon, or subsequently within 4 days after service of such order on him, to deliver up to the plaintiffs vacant possession of the property comprised in the agreement, and that the defendant be ordered to pay to the plaintiffs the sum of £51 12*s.* 5*d.* appearing by the A
master's certificate to be the taxed costs of the plaintiffs in this action, and also their costs of this motion to be taxed by the taxing master, and that all further proceedings in this action be stayed.

The facts are these. On Dec. 31, 1938, the plaintiffs entered into a contract in writing with the defendant to sell, and the defendant to B
purchase and buy, some property at Broadstairs known as Bohemia for the sum of £5,000. The date fixed for completion was Mar. 25, 1939, and the defendant paid a deposit of £250 on account of the purchase money to Messrs. Reeve and Bayly, the vendors' agents, as stakeholders. The defendant did not complete on the appointed day, and, C
after some negotiation, the date for completion was changed from Mar. 25 to June 24, 1939. In return for that extension of time, the defendant paid to the plaintiffs' solicitors a further sum of £250 by way of deposit on June 9, 1939. The defendant did not complete his purchase on June 24, and, it not being completed, on Oct. 11, 1939, the plaintiffs D
issued their writ for specific performance of the contract. They applied for summary judgment under R.S.C., Ord. 14A, and on Dec. 18, 1939, they obtained a decree. That was an order made in chambers, and it ordered an account of what was due to the plaintiffs for the balance of the purchase money and of their costs of the action to be taxed and E
an account of the rents and profits of the property comprised in the agreement received by the plaintiffs since Mar. 25, and the deduction of what was coming from the rents and profits from the amount of the purchase money, interest and costs. Then it says:

F

> It appearing that the defendant had accepted the plaintiffs' title it is ordered that the plaintiffs be at liberty to prepare and execute a proper conveyance of the property to the defendant as an escrow to be delivered to the defendant on payment of the sum certified to be due on account of the purchase money interest and costs within the time limited as hereinafter appears, such conveyance, in case the parties differ, to be settled by the judge. . . .

Then it was ordered that the defendant do pay to the plaintiffs at the G
time and place specified by the judge, the sum which was certified to be the balance of the purchase money, interests and costs, and it was ordered that the plaintiffs should deliver to the defendant the conveyance duly executed by the plaintiffs together with all deeds and writings in the custody of the plaintiffs relating to the property. H

The master made his certificate pursuant to that order on Apr. 3, 1940, and certified that there was due to the plaintiffs from the defendant the sum of £4,715 12*s.* 2*d.*, and he appointed Friday, May 3, 1940, between the hours of 12 noon and 1 p.m. as the time, and Room No. 138 as the place, at which the defendant was to pay to the plaintiffs the sum of

£4,715 12*s.* 2*d.* and at which the plaintiffs were to deliver the conveyance and the title. The defendant failed to complete on the day fixed, and it is in those circumstances that this motion is brought.

One more fact ought to be stated, and that is that the defendant is in possession of the property he contracted to buy, and has been so since Mar. 24, 1939. That fact is the foundation of the claim in this motion for an order upon the defendant now within 14 days to deliver up possession of the premises comprised in the contract.

I think that, in ordinary circumstances, but for the Courts (Emergency Powers) Act, 1939, the order which the plaintiffs seek on this motion is one which would be made as a matter of course. It is not disputed, I think, that that is so, but it is said that the provisions of the Courts (Emergency Powers) Act, 1939, entitled the defendant now to raise, by way of answer to it, the rights which are given to him by sect. 1 (4) of that Act. If he can show that he is unable immediately to perform his obligation by reason of circumstances directly or indirectly attributable to the war, there is a discretion given to this court to restrict what would otherwise be the plaintiffs' normal rights, and it is said that this case is within the Courts (Emergency Powers) Act, 1939, s. 1 (1). It is conceded that, having regard to the decision of the Court of Appeal in *S. & A. Services, Ltd.* v. *Dickson* (1), the case is not within the provisions of subsect. (2). Subsect. (1) begins as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money . . .

It is said that, indirectly, as I understand it, in this case the plaintiffs are proceeding to execution on, or otherwise to the enforcement of, a judgment of the court. I do not think that they are doing anything of the kind. The plaintiffs brought their action for specific performance of a contract made before Sept., 1939, and obtained a decree by which the defendant was ordered specifically to perform it. Having taken that course, the plaintiffs deprived themselves of the right which the contract gave them to forfeit the deposit which the defendant had paid. While the action was pending, and after the decree had been made, they, as well as the defendant, were bound by the terms of the contract. They were bound to convey, and the defendant was bound to pay for, the property which the plaintiffs had agreed to sell and which the defendant had agreed to buy. They continued to be bound by the contract after the decree had been made. They can get the order which they are now asking for only from the court. They are free from the obligation which the order of Dec. 18 put upon them. The ground upon which the court gives them leave to forfeit the deposit appears to be that, in failing to perform the contract which he has been ordered to perform, the defendant is in contempt of court, but I can see in the remedy for which the plaintiffs are asking nothing in the nature of enforcing any judgment or order for the payment or recovery by the plaintiffs from the defendant of any sum of money. This is a case which, in my judgment, does not fall within the language of the Courts (Emergency Powers) Act, 1939, s. 1 (1). It therefore seems to me that the plaintiffs are entitled to the order for which their notice of motion asks. I also declare that the plaintiffs can give a good discharge for the deposit in the hands of the stakeholders.

Solicitors: *Lovell, Son & Pitfield*, agents for *Robinson & Allfree*, Ramsgate (for the plaintiffs); *Wigram & Co.* (for the defendants).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

LIQUIDATOR, RHODESIA METALS, LTD. (IN LIQUIDATION) *v.* TAXES COMMISSIONER.

[Privy Council (Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Porter), **April 25, 29, 30, May 27, 1940.**]

Privy Council—South Africa—Income tax—Assessment—Capital appreciation—Sale of whole undertaking at profit—Place of assessment—Mining claims in Southern Rhodesia acquired and developed by English company—Ordinance of Southern Rhodesia (*No.* 20 *of* 1918), *ss.* 4 (1), 5, 10.

The appellant company was incorporated in England, and its principal place of business was in that country. It acquired certain mining claims in Rhodesia by a contract made in England. Later, it went into voluntary liquidation and sold its whole undertaking to another company; also incorporated in England, making a profit of £146,000. This latter agreement was also made in England. The sole business of the appellant company was the purchase and development of immoveable property in Rhodesia. It was assessed to income tax in respect of the sum of £146,000 and contested that assessment on the grounds (i) that the amount of £146,000 was of a capital nature, and (ii) that it was not received, and did not accrue, from a source within Southern Rhodesia. The assessment was made under the provisions of the Ordinance of Southern Rhodesia (No. 20 of 1918), which provides, *inter alia*, that tax is payable on " the total amount other than receipts proved by the taxpayer to be of a capital nature, received by or accrued to or in favour of any person in any year . . . from any source within the territory . . . " :—

Held: (i) the amount of £146,000 was income, and not capital. This was a question of fact, found by both courts in South Africa, and there was ample evidence to support that finding.

(ii) the amount was received from a source within Southern Rhodesia—namely, the mining claims which the company had acquired and developed there.

[EDITORIAL NOTE. The sale of the whole of the assets of a business will generally produce a sum of money which must be regarded as capital. In the present case, it is held that, because the assets of the company were originally acquired for the purpose of development and sale, the money produced by their sale by the liquidator is in the nature of income. There is a further point as to whether this income accrued from any source within Southern Rhodesia. It was argued that, as all the parties concerned were companies registered in England, and as the agreements had been made in England, the source of this asset was in

England. It is decided, however, that the source of the asset is not a matter which is a legal concept, but is that which the practical man regards as the real source of the income. Where the money is the result of a sale of immoveable property, it is said that the practical man would regard the source of that money as the country in which the immoveable property is situated.

As to Capital or Income, see HALSBURY, Hailsham Edn., Vol. 17, p. 118, para. 222; and for Cases, see DIGEST, Vol. 28, pp. 17-20, Nos. 87-99.]

Cases referred to:

(1) *Lovell & Christmas, Ltd.* v. *Taxes Comr.* (1907), 97 L.T. 651; 28 Digest 36, case *f*; *on appeal*, [1908] A.C. 46.

(2) *Maclaine & Co.* v. *Eccott* (1926), 42 T.L.R. 416; 28 Digest 33, *172*; *varying* (1924), 132 L.T. 173.

(3) *Studebaker Corpn. of Australasia* v. *New South Wales Taxation Comr.* (1921), 21 S.R.N.S.W. 497; 28 Digest 35, case *d*.

(4) *Taxes Comr.* v. *Dunn & Co., Ltd.*, [1918] App.D. 607; 28 Digest 36, case *h*.

(5) *Overseas Trust Corpn.* v. *Inland Revenue Comr.*, [1926] App.D. 444.

(6) *San Paulo (Brazilian) Ry. Co.* v. *Carter*, [1896] A.C. 31; 28 Digest 27, *142*; 65 L.J.Q.B. 161; 73 L.T. 538; 3 Tax Cas. 407.

Appeal by the liquidator of the appellant company from the Appellate Division of the Supreme Court of the Union of South Africa (Stratford, C.J., de Villiers, de Wet and Tindall, JJ.A., and Feetham, A.J.A.), dated Mar. 22, 1938, affirming a decision of Hudson, J., sitting as a judge in the High Court of Southern Rhodesia, dated Oct. 7, 1937. The facts are fully set out in the judgment of their Lordships delivered by Lord Atkin.

J. Millard Tucker, K.C., and *T. N. Donovan* for the appellant.

Roland Burrows, K.C., and *Reginald P. Hills* for the respondent.

Lord Atkin: This is an appeal from the Appellate Division of the Supreme Court of the Union of South Africa, who affirmed a decision of Hudson, J., in the High Court of Southern Rhodesia, dismissing an appeal by the liquidator of the appellant company from an assessment to income tax in the sum of £146,000 for the year ending Mar. 31, 1936. The assessment was made under the provisions of the Ordinance of Southern Rhodesia (No. 20 of 1918). It is desirable to set out some of the sections of that ordinance:

> 4 (1). There shall be charged, levied and collected throughout the territory, subject to such conditions and to such exemptions and abatements as are hereinafter provided, an income tax, at the rate and calculated in the manner specified hereunder, in respect of any taxable income received by or accrued to or in favour of any person . . .
>
> 5. For the purposes of this chapter "gross income" means the total amount other than receipts or accruals proved by the taxpayer to be of a capital nature, received by or accrued to or in favour of any person in any year or period assessable under this chapter from any source within the territory or deemed to be within the territory . . . an amount shall be deemed to be derived from a source within the territory if it is received by or accrues to or in favour of any person ordinarily resident in the colony or whose principal place of business is situate therein or whose business is wholly or partly managed therefrom . . . "income" means the amount remaining of the gross income of any person for any such year or period after deducting therefrom any amounts exempt from income tax in the hands of such person: "taxable income" means the amount remaining after deducting

from the income of any person all the amounts other than abatements allowed as deductions under this chapter;

10. Income shall be deemed to have accrued to any person from a source within the territory, where it has been received by or has accrued to or in favour of such person by virtue of (1) any contract made within the territory for the sale of goods, whether such goods have been delivered or are to be delivered in or out of the territory; (2) any service rendered or work or labour done in the carrying on in the territory of any business, trade, profession or occupation . . .

35 (12) (*b*). Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs in whole or in part anything within this colony, and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business within this colony and to have derived from a source within this colony a proportionate part of any profit ultimately derived from the sale thereof outside of this colony. The commissioner shall have full discretion of determining such proportionate part.

(*c*) Nothing in para. (*b*) of this subsection shall in any way affect the generality of the term "carrying on business" as used elsewhere in the ordinance.

Two questions arose on the appeal—namely, (i) whether or not the amount assessed in respect of a receipt proved by the taxpayer was to be of a capital nature, and (ii) whether or not it was an amount received from any source within the territory. The first question was decided against the appellant by all the judges in South Africa. It appears to be a question of fact, and, as there are concurrent findings in the High Court of Southern Rhodesia and in the Supreme Court of the Union, the only question which would arise would be whether or not there was evidence to support the findings. It is not necessary to state in detail the facts relating to this contention. It is sufficient to say that the appellant company was incorporated on Nov. 30, 1935, as a private company with nominal capital of £10,000, of which £8,002 was issued. The chairman, who was a large shareholder, was Sir Edmund Davis. On the same day, St. Swithin's Ores and Metals, Ltd., was incorporated as a private company, with a nominal capital of £100,000. Sir Edmund Davis was also chairman and a large shareholder in this company. On Dec. 5, 1935, Sir Edmund Davis, who was entitled to a number of tungsten mining claims in Southern Rhodesia, sold a number of them to the St. Swithin's company for £37,500, and on Dec. 12, 1935, he sold certain other of his mining claims to the Rhodesia Metals company for £5,000 cash. On Jan. 20, 1936, the St. Swithin's company increased its capital by an amount of £200,000. On Jan. 27, 1936, at an extraordinary general meeting of the company, a special resolution was passed that Rhodesia Metals be wound up voluntarily. One Weatherley was appointed liquidator. The company in the short space of its existence had spent £2,000 in development work on the claims in Southern Rhodesia. On Feb. 5, 1936, the liquidator wrote to the St. Swithin's company offering to sell the company's mining claims for £150,000, to be satisfied in fully-paid shares, an offer which St. Swithin's accepted by a letter next day. On Feb. 28, 1936, the liquidator wrote to St. Swithin's stating that he had discovered that the company was entitled to further mining claims, and was subject to possible liabilities in respect of claims, royalties, and so on, and offered, in substitution for the former agreement, to sell the whole undertaking of the company, including £2,180 in cash, subject to its liabilities, for cash and shares. On Mar. 3, 1936, St. Swithin's wrote offering to buy the whole undertaking as offered for £152,000, payable as to £150,000 in fully-paid shares and as to £2,000 in cash, and on Mar. 5, 1936, by special resolution of the members of Rhodesia Metals, it was resolved to accept the offer. The transaction was duly completed, and the mining claims were transferred on the register from Rhodesia Metals to the St. Swithin's company. *Prima facie,* the sale by a liquidator of the whole undertaking of a company would result in a capital asset, but, in the view of HUDSON, J., Rhodesia Metals had acquired the claims as an operation of business for the purpose of developing and selling them in furtherance of a scheme of profit-making. In the view of the judge, the liquidation and the offer of sale by the liquidator merely formed part of the original scheme of profit-making, and the amended offer of the sale of the whole undertaking was, in the circumstances, an immaterial variation of the business operation. As seen by STRATFORD, C.J., it was the culminating step in the scheme designed when the claims were bought, and was made for the purpose of concluding the operation of profit-making which was on hand when the liquidation was commenced. There appears to be ample evidence upon which the judges in South Africa could come to the conclusion which they reached on this issue, and on this point the appeal must fail.

The second question must now be considered. It was strenuously urged throughout the appeal here, as in South Africa, however, that the price received was not a receipt from a source in Southern Rhodesia. The respondent, it was said, was faced with a dilemma. The contention is that this was a capital sum. If so, the tax is clearly not exigible. If, however, it was not a capital sum, it was only because it was the result of a business operation. If so, the only source is the business, and the place where the business is carried on is the source of the profit made by the business, and, as there can only be one source for one business profit, one has only to see where the business which earned that profit was carried on. That place is England, where the head seat and directing power were situate, where both the contracts of purchase and sale were made, and where the consideration for the sale was in fact received. In support of this contention, numerous cases founded on the various Income Tax Acts, English, Australian, New Zealand and South African, were cited, chiefly as to business in buying and selling commodities, such as *Lovell & Christmas, Ltd.* v. *Taxes Comr.* (1), *Maclaine & Co.* v. *Eccott* (2), *Studebaker Corpn. of Australasia* v. *New South Wales Taxation Comr.* (3), *Taxes Comr.* v. *Dunn & Co., Ltd.* (4) and *Overseas Trust Corpn.* v. *Inland Revenue Comr.* (5).

Their Lordships have no criticisms to make of any of those decisions, but they desire to point out that decisions on the words of one statute are seldom of value in deciding on different words in another statute, and that different business operations may give rise to different taxing results. The charging words of the English statute charge annual profits or gains arising to any person residing in the United Kingdom from any trade wherever carried on, and those arising to any person although not resident in the United Kingdom from any trade exercised within the United Kingdom.

If those words are looked at, they are obviously different from the Southern Rhodesian charging words:

> . . . total amount [other than capital] received by . . . any person . . . from any source within the territory . . .

It is desirable also to point out that—at any rate, for different taxing systems—income can quite plainly be derived from more than one source, even where the source is business. For instance, in the case of the business of a railway company whose railway is situate abroad, as in *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (6), while the English company may be assessed in England on the whole of its profits because it carries on part of its business there, yet it could not be doubted that so much of the profits of the business as were in fact earned from running the railway in Brazil were derived from exercising a business in Brazil, and still less could it be doubted that the sums received by the company in Brazil were received from a source in Brazil. In the present case, their Lordships do not find it necessary to formulate a definition which will afford a universal test of when an amount is "received from a source within the territory." A doubt may be expressed whether the words borrowed by Stratford, C.J., from Innes, C. J., in *Overseas Trust Corpn.* v. *Inland Revenue Comr.* (5)—namely, "productive employment of capital"—really help to define the situation. Is capital productively employed in the place where it purchases stock which is profitably sold elsewhere, or in the place where the stock which now represents the capital is sold, or, for purposes of the test, must both purchases and sales occur in the same place, or is it sufficient that the place of the direction of the employment of the capital in purchasing or selling should denote where the capital is productively employed? Perhaps, in other words, it may be asked, does it mean more than carrying on business in a place? Their Lordships incline to the view quoted with approval from Ingram on Income Tax, p. 66, by de Villiers, J., in his dissenting judgment:

> Source means not a legal concept but something which a practical man would regard as a real source of income . . . the ascertaining of the actual source is a practical hard matter of fact.

At any rate, in the present case, whatever may be the right view of the source of receipts derived from trading in commodities, their Lordships find themselves dealing with a case where the sole business operation of an English company is the purchase of immoveable property in Southern Rhodesia and its development in that territory for purposes of transfer in that territory at a profitable price. The company never adventured any part of its capital except on that or those immoveables. As a hard matter of fact, the only proper conclusion appears to be that the company received the sum in question from a source within the territory—namely, the mining claims which they had acquired and developed there for the very purpose of obtaining the particular receipt. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed with costs.

A Solicitors: *Holmes, Son & Pott* (for the appellant); *A. F. & R. W. Tweedie* (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

LEVY *v.* ASSICURAZIONI GENERALI.

B [PRIVY COUNCIL (Lord Thankerton, Luxmoore, L.J., and Sir Philip Macdonell), **April 23, June 3, 1940.**]

Privy Council—Palestine—Insurance—Property insurance—Construction of policy—Loss by reason of specified occurrences happening during "abnormal conditions" not covered—Onus of proving loss by other than one of specified C *occurrences on insured if insurers alleged "abnormal conditions"—"Civil commotion."*

The appellant insured against fire a stock of merchandise at Jaffa with the respondent company on the terms, *inter alia*, that the insurance was not to cover loss or damage occasioned by, contributed to, or arising out of, a number of specified occurrences, and that any loss D or damage happening during the existence of abnormal conditions occasioned by, contributed to, or arising out of, such occurrences should be deemed to be loss or damage not covered by the insurance except to the extent that the appellant should prove that such loss or damage happened independently of the existence of such abnormal conditions. It was a further term of the policy that, in any action where the respondent company alleged that, by reason of the above conditions, the loss E or damage was not covered, the onus of proving the contrary was to be upon the appellant. The insured merchandise was destroyed by fire. It was conceded by the insurance company that, of the specified occurrences enumerated in the policy, the only one in existence at the date of the fire was that of "civil commotion":—

HELD: (i) by the express terms of the contract, the insurance company was relieved from the onus of proving that one or other of the occurrences F specified in the policy existed at the time of the fire.

(ii) the appellant was not obliged to show that no abnormal condition existed at that time. He had only to show that no one of the occurrences specified in the policy then existed.

(iii) "civil commotion" is "a stage between riot and civil war . . . an insurrection of the people for general purposes," but "an organised G conspiracy to commit criminal acts" does not amount to commotion.

[**EDITORIAL NOTE.** The general rule is that the onus of proving that a condition has been broken rests upon the insurers. By express words in the policy this onus of proof may be placed upon the insured. This proposition, until the decision in this case, could only be supported by a *dictum* of SCRUTTON, L.J., but it is here made the subject of express decision. On the point of the definition of "civil H commotion," their Lordships merely approve former decisions.

AS TO EXPRESS AGREEMENT AS TO ONUS OF PROOF, see HALSBURY, Hailsham Edn., Vol. 18, p. 439, para. 628; and FOR CASES, see DIGEST, Vol. 29, p. 370, Nos. 2970, 2971.]

Cases referred to:

(1) *Re Hooley Hill Rubber & Chemical Co., Ltd., and Royal Insurance Co., Ltd.*, [1920] 1 K.B. 257; 29 Digest 57, *187*; *sub nom. Hooley Hill Rubber &*

Chemical Co., Ltd. v. *Royal Insurance Co., Ltd.*, 88 L.J.K.B. 1120; 121 L.T. 270; *affd.*, [1920] 1 K.B. 264.

(2) *Cooper* v. *General Accident, Fire & Life Assurance Corpn., Ltd.* (1923), 92 L.J.P.C. 168; 29 Digest 418, *3266*; 128 L.T. 481.

(3) *Motor Union Insurance Co., Ltd.* v. *Boggan* (1923), 130 L.T. 588; 29 Digest 418, *3267*.

APPEAL from the judgment of the Supreme Court of Palestine, dated Dec. 8, 1938, setting aside a judgment of the District Court of Jaffa, dated June 16, 1938. The facts are fully set out in the judgment of their Lordships delivered by LUXMOORE, L.J.

Valentine Holmes for the appellant.

Tristram Beresford, K.C., and *W. Baker Welford* for the respondents

LUXMOORE, L.J.: On Nov. 13, 1936, the appellant entered into a contract of insurance against loss or damage by fire with the respondent company in respect of a stock of merchandise deposited in a warehouse situate in the commercial centre, Jaffa. The terms of the contract are embodied in a policy of insurance issued by the respondent company to the appellant. The only condition material to be considered in this appeal is condition 6, which is in the following terms:

> This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely occasioned by or contributed to by any of the following occurrences or which either in origin or extent directly or indirectly, proximately or remotely arises out of or in connection with any of such occurrences, namely: (1) Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance. (2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military, naval, or usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
>
> Any loss or damage happening during the existence of abnormal conditions, whether physical or otherwise directly or indirectly, proximately or remotely occasioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.
>
> In any action suit or other proceeding where the company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance the burden of proving that such loss or damage is covered shall be upon the insured.

On Dec. 14, 1936, a fire occurred in the warehouse containing the insured stock, and damage was caused thereto to an extent which was subsequently fixed by agreement between the parties at £P.1,900. The appellant claimed payment of this sum from the respondent company, but the latter refused to pay, alleging that the appellant's claim was not covered by the policy because one or other of the occurrences specified in condition 6 (2) existed at the time when the fire occurred.

On Mar. 30, 1937, the appellant instituted proceedings against the respondent company in the District Court of Jaffa claiming payment by the respondent company of the sum of £P.1,900, with interest and costs. In the course of these proceedings, a preliminary question was raised for the determination of the District Court—namely, whether the onus of proving the existence of one or other of the occurrences specified in condition 6 (2) of the policy lay on the appellant or on the respondent company. On Jan. 27, 1938, the District Court held that the onus of proof was on the respondent company. As the result of this ruling, when the action subsequently came on for hearing on June 1, 1938, counsel for the respondent company called as a witness on behalf of that company the assistant district superintendent of police at Telaviv. No other witness was called on behalf of either the respondent company or the appellant, and, after hearing argument by counsel on behalf of both parties, the District Court reserved judgment. On June 16, 1938, the District Court ordered the respondent company to pay to the appellant the sum of £P.1,900 with interest and costs. The basis of this decision, as appears from the written judgment of the District Court, is that the respondent company had not discharged the onus of proving that abnormal conditions existed at the date of the fire in the area where the warehouse was situate, the court holding that the question whether the conditions were abnormal must be decided by comparing the conditions existing at the date when the policy was issued with those existing before Apr. 19, 1936, when certain emergency regulations under the Palestine (Defence) Order in Council, 1931, were made by the High Commissioner for Palestine.

On July 12, 1938, the respondent company appealed to the Supreme Court of Palestine from the order of the District Court of Jaffa. On Dec. 8, 1938, the Supreme Court allowed the appeal and set aside the judgment of the District Court, entering judgment for the respondent company with costs in the Supreme Court and in the District Court. The appellant has appealed to His Majesty in Council from the judgment of the Supreme Court with the leave of that court. The Supreme Court held that, upon the true construction of condition 6 of the policy, if abnormal conditions were alleged by the respondent company to have existed at the date of the fire, the onus of proving that the loss was covered, and was not excluded, by condition 6, was on the insured, and not on the respondent company. The Supreme Court dealt with this question in the following passage:

> In the third paragraph of the clause [condition 6], the parties have expressly agreed as to the onus of proof, and I know no reason why they should not do so. It is true that the primary object of a fire policy is to insure against fire, that it is often difficult to prove how a fire emanates, and that the company draws up the policy, and, in consequence, where there is an ambiguity, courts are inclined to construe it in favour of the insured, but there seems to me to be no ambiguity in the paragraph. "Allege" does not mean "prove," and I would point out, with all respect to the court below, that, if its interpretation is applied, this paragraph would appear to be surplusage. In the result, when the company relies upon the third paragraph, it is upon the insured to prove either the absence of the exception or that, if the exception existed, it did not occasion or contribute to the loss, and that the loss did not arise out of it, or that the loss or damage, in cases where abnormal conditions existed, happened independently of the existence of such abnormal conditions.

Their Lordships think that this criticism of the ruling of the District Court with regard to onus of proof is well-founded, and that the District Court was in error in holding that the onus of proving that one or other of the occurrences specified in condition 6 (2) existed at the time of the fire was on the respondent company. It was placed upon the appellant by the express terms of the contract. There can be no doubt that, as a matter of agreement between parties, the onus of proof of any particular fact or of its non-existence may be placed on either party, in accordance with the agreement made between them: *Re Hooley Hill Rubber & Chemical Co., Ltd., and Royal Insurance Co., Ltd.* (1), *per* SCRUTTON, L.J., at p. 273. The Supreme Court, having thus disposed of the question of onus, proceeded to consider what the insured must prove if the court is satisfied that abnormal conditions existed at the date of the fire, and pointed out, no doubt rightly, that in that case the insured must prove positively what was the cause of the fire, or that the abnormal conditions could not in any reasonable probability have caused the fire. The position is summed up by the Supreme Court in these words:

> Bearing in mind, as I have said, that the object of a fire insurance is to insure against fire, and that it is common knowledge that in many cases it is difficult, if not impossible, to prove the cause of a fire, and that the condition does not provide that the insured shall prove the cause of the fire, I am of opinion that the insured can discharge the onus of showing that the abnormal conditions could not reasonably have caused or contributed to the fire. In the result, subject to the shifting to and fro of the onus of proof in order that the plaintiff [the appellant] may recover, it is necessary for the court to be satisfied either that there was no abnormal condition joined by a chain of causation to one of the events set out in the earlier part of the condition or that, if there was that condition of affairs, it did not affect the fire.

Their Lordships see no reason to disagree with this summary if by the phrase "no abnormal condition joined by a chain of causation to one of the events set out" in condition 6 nothing more is meant than the non-existence of any one of the occurrences enumerated in subclause (1) or subclause (2) of the condition, for it seems plain as a matter of construction that the abnormal conditions referred to in condition 6 are not abnormal conditions generally, but are such conditions as arise out of, or in connection with, any of the occurrences enumerated in the two subclauses. However, the Supreme Court do not appear to have considered whether, on the evidence before the District Court, it was possible to hold that any one of the specific occurrences mentioned in subclause 2 existed at the date of the fire, because, when criticising the judgment of the District Court, they state that the court below:

> . . . does not appear to have decided if conditions were abnormal in the general sense but to have decided that they were normal within the contemplation of the parties in that the state of affairs when the policy was issued is the standard of normality to be applied.

The attitude of the Supreme Court is made clearer by this later passage in the judgment:

> At the date of the fire, the emergency regulations [made by the High Commissioner under the Palestine (Defence) Order in Council, 1931] were in force. In itself, that would seem to be an abnormal condition other than physical, but it could hardly be suggested that the loss did not happen independently of that.

It is to be observed that the passing of emergency regulations is not one of the occurrences specified in either of the subclauses of condition 6.

The Supreme Court called attention to the evidence of the assistant district superintendent of police in detail, the facts noticed being (i) that, after the removal of the curfew in the Jaffa area on Oct. 26, 1936, fires took place frequently in that area, (ii) that enmity existed between Jews and Arabs at the time of the fire, (iii) that there existed a boycott which prevented Arabs from buying Jewish goods, and *vice versa*, (iv) that it would not be safe for Jews to walk in the quarter where the warehouse was situated at 6.45 p.m. on Dec. 14, 1936, (v) that police patrols were carrying rifles at that date, and (vi) that there were a number of outrages in Dec., 1936, in Jaffa, and a number of bombs were thrown. In addition to the evidence set out above, it was admitted by the parties that an official communique was printed in the PALESTINE POST of Oct. 16, 1936, under the heading Official Communique, Thursday, Oct. 15:

> There are no incidents to report since noon yesterday. The public is informed that owing to order having been restored and the absence of acts of violence, in future official communiques will be issued only when the occasion demands and the daily issue of an official communique as a matter of routine is being discontinued.

No doubt, considered apart from any other occurrence, the facts stated might lead to the conclusion that the conditions in the area were abnormal at the material date, but, with all respect to the judgment of the Supreme Court, this is not the point. The point is whether or not the evidence establishes that one of the occurrences mentioned in subclause (2) existed on Dec. 14, 1936. Their Lordships invited counsel for the respondent company at this Board to state which of the occurrences enumerated in condition 6 (2) he alleged were in existence at that date. He stated quite frankly that he did not think that he could succeed except under the heading "civil commotion," and he argued that the evidence established that such a condition, at the date of the fire, in fact existed. It is stated in WELFORD AND OTTER-BARRY'S FIRE INSURANCE, 3rd Edn., at p. 64:

> Civil commotion. This phrase is used to indicate a stage between a riot and civil war. It has been defined to mean an insurrection of the people for general purposes, though not amounting to rebellion; but it is probably not capable of any precise definition. The element of turbulence or tumult is essential; an organised conspiracy to commit criminal acts, where there is no tumult or disturbance until after the acts, does not amount to civil commotion. It is not, however, necessary to show the existence of any outside organisation at whose instigation the acts were done.

This statement appears to their Lordships to be accurate, and to be borne out by the several authorities cited in the notes to the text. In their Lordships' judgment, the proved facts in this case fall far short of those which were held in *Cooper* v. *General Accident, Fire & Life Assurance Corpn. Ltd.* (2) and in *Motor Union Insurance Co., Ltd.* v. *Boggan, Ltd.* (3), respectively, to be sufficient to satisfy the phrase "civil commotion." Their Lordships are satisfied that, on the facts proved, there was no civil commotion in existence at the date when the fire occurred, and their Lordships so hold. Having regard to this finding, and to the admission made by counsel already mentioned, their Lordships are bound to proceed on the footing that none of the occurrences specified in condition 6 (2) existed at the material date, and to hold that the respondent company's reliance on condition 6 fails. Their Lordships are consequently of opinion that the Supreme Court of Palestine was in error in holding that the appellant was not entitled to recover under the policy. In the result, their Lordships are of opinion that the judgment of the Supreme Court ought to be set aside and the judgment of the District Court of Jaffa restored, and that the respondent company should pay to the appellant his costs here and in the Supreme Court. They will, therefore, humbly advise His Majesty accordingly.

Appeal allowed with costs in both courts.

Solicitors: *Stanley & Co.* (for the appellant); *Dawes & Sons* (for the respondents).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*]

SMART BROTHERS, LTD. *v.* PRATT AND ANOTHER.

[Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Tucker, J.), **June 27, 1940.]**

Hire Purchase—Action for possession of goods—Written request for surrender followed by threat to take proceedings if arrears not paid by named date—No formal demand for possession—Validity of notice—Hire-Purchase Act, 1938 (*c.* 53), *ss.* 10, 11.

The second defendant was in possession of certain furniture under a hire-purchase agreement with the plaintiffs, to which the Hire-Purchase Act, 1938, applied. The first defendant had guaranteed performance of the agreement. The payments being in arrear (after more than one-third of the purchase-price had been paid) the plaintiffs' solicitors wrote determining the agreement and requesting the surrender of the goods, adding that, unless not later than a stated day the arrears were paid, proceedings to recover possession of the goods would be commenced. The plaintiffs did not, however, attend at the defendant's premises to seize the furniture:—

Held: (i) the letter was a good notice within the Hire-Purchase Act, 1938, s. 10, although it stated that the request for return would not be persisted in if the arrears were paid by a named date.

(ii) sect. 10 does not require that the request in writing for the surrender of goods shall be followed by a subsequent attendance at the hirer's premises to take them away.

[**EDITORIAL NOTE.** The reason for the inclusion of sect. 10 in the Hire-Purchase Act, 1938, may not be apparent at first sight, but it has to be remembered that in an action in detinue a clear demand and refusal must be proved. The section was included to avoid the provisions of sect. 11 affording the hirer an opportunity of pleading that there was no proof of adverse possession.

As to Recovery of Possession of Goods by Action, see HALSBURY, Hailsham Edn., Supp., Hire Purchase, para. 812A; and for Cases, see DIGEST, Supp., Bailment, Nos. 252a-268c.]

Cases referred to:

(1) *Clements* v. *Flight* (1846), 16 M. & W. 42; 43 Digest 465, *10*; 16 L.J.Ex. 11; 8 L.T.O.S. 166.

(2) ***Thorogood* v. *Robinson*** (1845), 6 Q.B. 769; 43 Digest 476, *146*; 14 L.J.Q.B. 87; 4 L.T.O.S. 292.

APPEAL by the plaintiffs from an order of His Honour JUDGE TREVOR HUNTER, delivered in the Ilford County Court on Apr. 8, 1940. The action was for detinue. The plaintiffs claimed for the return of furniture of the value of £26 13*s*., let under two hire-purchase agreements made between them and the second defendant, the wife of the first defendant, who in his turn gave two guarantees in writing for the due performance of the agreements. The goods comprised in the first agreement were valued at £21 12*s*. 6*d*. The hirer agreed to pay the owners 15*s*. for the option of purchase, and monthly instalments of 11*s*. for hire. After she had paid £14 6*s*. 6*d*., she obtained further goods of the agreed value of £29 11*s*., and entered into a second agreement. This consolidated the first agreement, and provided that the total agreed value of the goods should be £51 3*s*. 6*d*., that the previous payments should be deemed to be paid as the consideration for the option of the purchase, that the future monthly instalments should be £1, and that the terms and conditions of the first agreement should apply. The first agreement provided, *inter alia*, that, until the goods became the property of the hirer by payment of the agreed value, they should remain the sole property of the owners, that the hirer should keep the goods free from distress, execution, or other restraint, and that she might terminate the hiring by returning the goods at her cost. In case of breach of any term, the owners might forthwith without notice terminate the hiring and repossess themselves of, and remove, the goods. Alternatively, by written notice they might forthwith absolutely determine and end the agreement and the hiring thereby constituted, and thereupon the hirer should no longer be in possession of the goods with the owners' consent. No relaxation or indulgence shown to the hirer should prejudice the strict rights of the owners or operate as notice of waiver of any breach. From the date of the second agreement, the hirer began to fall into arrears. About Dec. 15, 1939, a representative of the plaintiffs called upon her and demanded the goods. She refused to give them up, saying that she intended to pay for them. On Jan. 5, 1940, her arrears amounted to £10 7s. On that date, the plaintiffs' solicitors wrote her a letter, stating erroneously that the arrears were £16 7*s*. 6*d*., and also stating that the letter was to be treated as a formal notice determining the hiring of the goods and requesting their surrender, that, unless she paid the arrears by Jan. 9, proceedings would be commenced against her to recover possession, but that, if she preferred to deliver up the goods without proceedings, she might within 3 days furnish the solicitors with a day and time when the plaintiffs might call and collect the goods. She did not reply to the letter, and retained the goods. At the time of the action she had paid £24 10*s*. 6*d*. After sending the letter, the plaintiffs did not send any other representative to the premises to obtain possession or surrender of the goods. The plaintiffs contended in the action that, if default occurred in the payment of an instalment, the hiring terminated *ipso facto* and their right to possession of the goods accrued. If any act by the plaintiffs was necessary to give the plaintiffs that right, the demand of the representative was sufficient. Alternatively, the letter determined the hiring, and, as the words in it requesting the surrender of the goods followed the words determining the hiring, the request was made after the right to recover possession of the goods had accrued, and the letter, therefore, brought into effect the provisions of the Hire-Purchase Act, 1938, s. 10, and that, after a request to surrender goods had been made in accordance with that section, it was not necessary for an owner to attend at the hirer's premises to obtain the surrender of the goods, but the owner had a good cause of action in detinue if the goods remained in the hirer's possession. The county court judge held that the demand of the representative on Dec. 15 was a clear and sufficient act entitling the owners to terminate the hiring and repossess the goods, though he did not decide whether or not such an act was necessary. Therefore, an unequivocal request in writing for the surrender of the goods would have brought sect. 10 into operation. He did not think that the letter alone would have complied with sect. 10, for the letter must be read as a whole, and the language of the section contemplated two distinct and separate events. It was not sufficient to insert in the same letter one sentence intended to have one effect followed by another sentence intended to have a subsequent effect. Moreover, the request made in the letter was equivocal, for it stated that, unless the arrears of the hirer were paid by a certain date, proceedings would be commenced to recover the goods. This implied that, if the arrears were paid, the hirer might retain the goods. Sect. 10 did not authorise such a qualified request for surrender. As there was no other evidence of refusal to return the goods, and no evidence of adverse possession, the action must fail. If this view were incorrect, he added that, if the plaintiffs could rely on sect. 10, there arose the question of whether or not it was necessary for the owner to attend at the hirer's premises for the purposes of endeavouring to obtain the surrender of the goods. A hirer was only bound to deliver goods to the owner at the hirer's own address: *Clements* v. *Flight* (1). Much clearer language than that of sect. 10 would be needed to alter the law as thus stated. This section merely relieved an owner of the burden of the very strict proof of demand and refusal that formerly lay upon him: *Thorogood* v. *Robinson* (2). The wide effect for which the plaintiffs contended might entail extreme hardship upon hirers—e.g., if a hirer obtained furniture from an owner whose premises were at a distance. In the opinion of the county court judge, therefore, it was still necessary for owners to attend at the hirer's premises to obtain surrender unless they were told that such attendance would be ineffective. The plaintiffs did not attend, and for that reason also their action failed. Dealing with the claim against the husband as guarantor on the footing that the action against the wife succeeded, the county court judge said that the second guarantee, lacking any essential terms of the contract, had no effect. The first guarantee was for the payment of £21 12*s.* 6*d.*, and, as his wife had paid £24 10*s.* 6*d.*, he was free from liability.

In case his judgment was reversed, the county court judge drafted A an order in the form for which the plaintiffs asked. It was an order for delivery of the goods, suspended while 20*s.* per month was paid, and to cease when the full amount of £51 3*s.* 6*d.*, payable under the agreement, should have been paid. He assessed at £26 13*s.* the value of the goods claimed. The plaintiffs appealed.

B *G. J. Lynskey, K.C.*, and *A. A. Pereira* for the appellants.

The respondents did not appear and were not represented.

MacKinnon, L.J.: This is an appeal from the decision of His Honour Judge Trevor Hunter, K.C., sitting at Ilford County Court. The C claim arose under a hire-purchase agreement, under which Mrs. Pratt obtained possession of a quantity of furniture the property of the plaintiffs under an obligation pursuant to the agreement to pay so much per month. She fell into arrears, and in consequence the plaintiffs desired to claim re-possession of the goods which they had let to her. Their D right to do so is now subject to the provisions of the Hire-Purchase Act, 1938. They issued their plaint in the county court, claiming an order for delivery up to them of certain goods specified in the schedule. The whole question before the county court judge was whether they were entitled to an order for possession.

E Their rights in that respect are subject to the provisions of the Hire-Purchase Act, 1938, of which the two material sections are sect. 10 and sect. 11. Sect. 10 provides as follows:

> Where, in an action by an owner of goods which have been let under a hire-purchase agreement to enforce a right to recover possession of the goods from F the hirer, the owner proves that, before the commencement of the action and after the right to recover possession of the goods accrued, the owner made a request in writing to the hirer to surrender the goods, the hirer's possession of the goods shall, for the purpose of the owner's claim to recover possession thereof, be deemed to be adverse to the owner.

Sect. 11 provides that, where more than one-third of the hire-purchase G price has been paid:

> . . . the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action.

This was a claim to recover possession by action under sect. 11, and it H was necessary for the owner to prove, in order to establish the adverse possession of the hirer, that, before issuing his plaint, he had made a request in writing to the hirer to surrender the goods. He sought to do that by a letter written by his solicitors on Jan. 5, 1940, the receipt of which was acknowledged by the defendant. That letter refers to goods "in respect of which you are £16 7*s.* 6*d.* in arrear with your payments."

That was a mistake. It ought to have been £10 7*s.* The letter continues as follows:

> You must, therefore, please treat this letter as a formal notice determining the hiring of the said goods, and that our clients through ourselves hereby request the surrender thereof. Please take notice that unless not later than Tuesday next, the 9th instant, you pay the above-mentioned arrears, immediate proceedings will be commenced against you to recover possession of the goods.

The county court judge has held that that letter did not constitute a request in writing to the hirer to surrender the goods within the meaning of sect. 10. I am afraid that I cannot agree with that view. It is true that it is a conditional request, and that it gives a *locus penitentiœ* to the hirer. It intimates that the request for return will not be persisted in if she pays the arrears. However, unless the arrears are paid by a named date, as I think, it categorically requests the surrender of the goods. The fact that there is that conditional privilege to the hirer to avoid the necessity of surrender if she does something does not seem to me to impair the effectiveness of the letter as being a request in writing to surrender the goods.

I should have said that the section requires that this request shall be made after the right to recover possession of the goods has accrued. With regard to that, the county court judge has found—and there is no reason to differ from him—that that condition had arisen because on Dec. 15 the plaintiffs' man had gone round and asked if she wished to surrender the goods and, by reason of that, before the sending of this notice, a right to recover possession of the goods had accrued.

The other matter which the county court judge found to be an obstacle in the way of the plaintiffs was that, in his view, under sect. 10, in addition to the request in writing which the section requires for the surrender of the goods, it is necessary that the owner shall make a subsequent visit to the hirer's premises with a van or other vehicle to take away the goods. I do not very clearly follow the reasoning or view of law which is said to have necessitated that condition. It seems to me to be clearly outside the language of sect. 10. Nothing of the sort is required by sect. 10. I do not see in law any reason why you should add that condition to the provisions of the section, which says quite simply that, after a request has been made for surrender:

> . . . the hirer's possession of the goods shall, for the purpose of the owner's claim to recover possession thereof, be deemed to be adverse to the owner.

Thus, under sect. 11, he is entitled to ask the court to make the order for delivery of possession to him.

On both these grounds, I think that the county court judge was wrong in saying that the plaintiffs had not *prima facie* established their right to relief in the action. He ought to have dealt with the claim and considered it on its merits, pursuant to the discretion vested in him under sect. 12 of the Act. The result is that this appeal must be allowed. In his judgment, the county court judge said that, in case he were wrong on this point, under his powers under sect. 12 he would make an order for delivery of the goods to be suspended so long as the defendant paid £1 per month. As he has by anticipation given that indication, I think that we can direct that an order in those terms shall be substituted for his judgment.

Luxmoore, L.J.: I agree. There are two quite short questions which arise on this appeal. First, what is the true construction of the Hire-Purchase Act, 1938, s. 10? The county court judge has held that a request in writing for the surrender of the goods the subject-matter of the hire-purchase agreement is not by itself sufficient. It must be followed by a formal demand for the surrender of the goods. On looking at the section, I think that it is impossible to find why he has added that extra requirement. Sect. 10 provides as follows:

> Where, in an action by an owner of goods which have been let under a hire-purchase agreement, to enforce a right to recover possession of the goods from the hirer, the owner proves that, before the commencement of the action and after the right to recover possession of the goods accrued, the owner made a request in writing to the hirer to surrender the goods, the hirer's possession of the goods shall, for the purpose of the owner's claim to recover possession thereof, be deemed to be adverse to the owner.

All that the section says is that there must be a request in writing. What follows from the request is that, if that is proved at the hearing of the action to recover possession, then it is not necessary to prove any other fact to establish that the possession of the hirer is adverse to that of the owner.

The requirements of sect. 10 are really evidential, because, under sect. 11, in the present case it would be impossible to take possession of the goods, inasmuch as more than one-third of the purchase price has been paid. Thus, the only method of enforcing the right to recover possession open to the owner is by action. If the owner went to the hirer and asked for surrender of the goods, the answer that the hirer would make is: "You cannot take the goods, because sect. 11 says that you can recover them only by process in court." If, on that reply, the owner were to start an action, and sect. 10 were not there, he would be met at the trial by the fact that there was no proof of adverse possession, inasmuch as the refusal to hand over the property was due to the provisions of sect. 11. I think that it is quite plain that the object of sect. 10 is to enable the owner to satisfy the requirements as to proof of adverse possession in his action for recovery of his goods. I can see no ground for reading into the section any necessity for following up the request in writing with a formal demand for possession.

The only other question is whether or not the notice which was given on Jan. 5 was a sufficient notice to meet the requirements of sect. 10. The material part of the letter of Jan. 5 is a statement that this letter must be treated:

> . . . as a formal notice determining the hiring of the goods, and that our clients through ourselves hereby request the surrender thereof.

As far as a formal notice determining the hiring is concerned, that was not necessary, because the county court judge has held that there was a formal notice determining the hiring on the previous Dec. 15. The county court judge did suggest that the letter might be insufficient, because it did not give formal notice determining the hiring at the same time as it asked for the surrender of the goods. I do not propose to A deal with that point, because it does not arise in the circumstances of this case. There is no doubt that there is a request for surrender in that letter. The letter continues as follows :

> Please take notice that unless not later than Tuesday next the 9th instant you pay the above-mentioned arrears, immediate proceedings will be commenced B against you to recover possession of the goods.

The county court judge has held that that sentence has made the notice ambiguous. He says that the letter gives an option to the recipient as to what she will do in the matter. I do not so read the letter. I read it as a formal demand for the surrender of the property, followed by C a *locus penitentiæ* given to the hirer of the goods, if she complies with the terms of that notice, by which the surrender asked for would not then be enforced. None the less, the letter is an unequivocal demand for surrender. The hirer did not comply with the conditions set out in the following paragraph, and the formal demand for surrender D remained unequivocal.

Therefore, I agree that the county court judge's judgment must be set aside, and that there must be substituted for it the order which he said he would make if this court came to a conclusion on the question of law different from that at which he arrived. The court has come E to a different conclusion, and, therefore, the order which he suggests is the proper order to be substituted for that which he originally made.

TUCKER, J. : I agree. The only question in this case is whether the letter of June 5, 1940, is a sufficient request in writing to the hirer F to surrender the goods within the meaning of the Hire-Purchase Act, 1938, s. 10. On reading the judgment of the county court judge, I think that the matter which really troubled him was whether the request in writing to surrender under this section might be said to be satisfied if the hirer was called upon to send the goods several hundreds G of miles by rail to the premises of the owners. I do not think that that difficulty arises in this case. We are dealing with this particular request in the letter of Jan. 5, 1940, and I agree with what has been said by MacKinnon and Luxmoore, L.JJ., with regard to that.

I would only add that, when one reads this letter as a whole, it is H quite clear, in my view, that the owners are not requesting this hirer to send the goods to their premises a long distance away. The essential part of this notice contains these words :

> If you prefer to deliver up the goods without proceedings being commenced for their delivery . . . you may, within 3 days of the date of this letter, furnish us

with a day and time when our clients may call with your consent to collect the goods.

Thus, it is perfectly clear that what is being requested is a surrender to the agent of the plaintiffs at the premises of the defendant at a time and date convenient to the defendant. Therefore, I do not think that the difficulty which I think was in the mind of the county court judge arises in this case at all. I agree that the appeal should be allowed, and that the order suggested should be made.

Appeal allowed. Judgment entered for the plaintiffs against the second defendant for delivery up of the goods. Delivery to be suspended during payment of 20s. per month. Such payments to cease when the full amount of £51 3s. 6d. should be paid.

Solicitors: *Tudor & Rowe* (for the appellants).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

SOUTHERN *v.* WATSON AND OTHERS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **July 2, 1940.**]

Income Tax—Profit from trade—Sale of business—Profits on unexecuted orders of vendor executed by purchaser as agent for vendor.

By the terms of an agreement whereby a trader converted his business into a private limited company, it was provided that 75 per cent. of the profit on orders unexecuted at the date of completion should be paid to the trader, and such orders were to be executed by the company as agent for the vendor. Under this clause of the agreement, the trader received £10,607, and his personal representatives (the trader having died shortly after the sale) were assessed to tax upon that sum as profits of the trade carried on by the trader:—

HELD: the sum of £10,607 was a profit of a business carried on by the company as agent for the trader, and was not a capital sum received by the trader. The assessment was, therefore, rightly made.

[**EDITORIAL NOTE.** Upon the sale of a business as a going concern, there are certain orders which the vendor has not had time to execute, or which possibly, by the terms of the orders themselves, do not fall to be executed until after the date for completion of the contract. Arrangements have to be made, therefore, for the purchaser to complete these orders, and he will generally receive some consideration for his trouble in doing this. In the present case, the purchaser receives 25 per cent. of the proceeds of these transaction, and 75 per cent. is to be handed over to the vendor. The argument here is whether this 75 per cent. is capital, as being, in effect, part of the purchase price, or part of the profits of the business sold. The latter is held to be the correct view.

AS TO INCOME TAX AND SALE OF BUSINESS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 98, 99, para. 192; and FOR CASES, see DIGEST, Vol. 28, pp. 18, 19, Nos. 91-97.]

Cases referred to:

(1) *Dott* v. *Brown*, [1936] 1 All E.R. 543; Digest Supp.; 154 L.T. 484.

(2) *Baker* v. *Cook*, [1937] 3 All E.R. 509; Digest Supp.; 21 Tax Cas. 339.

(3) *Shipstone (James) & Sons, Ltd.* v. *Morris* (1929), 14 Tax Cas. 413; Digest Supp.

(4) *Hillerns & Fowler* v. *Murray* (1932), 146 L.T. 474; Digest Supp.; 17 Tax Cas. 77.

APPEAL by the taxpayers from a decision of LAWRENCE, J., dated Mar. 20, 1940. The facts are fully set out in the judgment of SCOTT, L.J. Before the commissioners, it was contended on behalf of the taxpayers that £10,607, the amount received under cl. 8 of the agreement hereinafter referred to, being 75 per cent. of the profit on unexecuted orders at the completion date of the sale of the business, was not a receipt of the trade carried on by the deceased before or after Aug. 9, 1934, and that the deceased did not set up or commence a new trade on or after that date. On behalf of the inspector of taxes, it was contended that the sum in question was properly assessed as profits of the trade carried on by the vendor through his agent, the company, in the year ended Apr. 5, 1935, and that, as such profits had not been included in any statement delivered by the vendor in his lifetime, they fell to be assessed upon his executors under All Schedules Rules, r. 18. The following cases were referred to: *Dott* v. *Brown* (1), *Baker* v. *Cook* (2), *Shipstone* (*James*) *& Sons, Ltd.* v. *Morris* (3) and *Hillerns & Fowler* v. *Murray* (4). The commissioners held that the payment of 75 per cent. in respect of the gross profits on orders unexecuted before July 31, 1934, under cl. 8 of the agreement formed part of the purchase price, and was a capital payment.

Raymond Needham, K.C., and *Michael E. Rowe* for the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the respondent.

Needham, K.C.: The question at issue is whether or not a person who ceased to carry on business on Aug. 9, 1934, can be assessed on profits which were made after that date. No profit made after the date of the transfer can be the profit of the person who has sold the business. It is a question of fact as to whether or not a business has been succeeded to, and the fact will not be affected by reason of there being some exclusions. All that the vendor did in respect of the contracts was to get the company to carry them out for him. The question that should arise, therefore, is whether or not that amounts to setting up and carrying on a new business. All that the vendor wanted was to get the money appropriated to these particular contracts. In no reading which can be given to this case, can this profit be a profit which was realised by Aug. 9, 1934. The assessment has been made upon a basis which is not in consonance with the Income Tax Acts.

Counsel for the respondent was not called upon.

SCOTT, L.J.: In this case, the question arises out of an agreement of sale by a person now deceased of, broadly speaking, his business to a limited company in 1934. In the agreement, dated Aug. 9, 1934, there are certain provisions with which I must deal, because it is out of those provisions that the question in the present appeal arises. I add that the question is as to the profits received by the vendor or his executors on orders which he had obtained before he sold his business on Aug. 9.

The commissioners before whom the question came decided that those profits were capital receipts, and no part of the income of the deceased, and that, consequently, the assessment upon his personal representatives under All Schedules Rules, r. 18, could not properly be made upon his personal representatives.

A The agreement in question provided that the vendor should sell and the company should purchase:

> . . . the goodwill of the business of the vendor as hitherto carried on [in London and Liverpool] as a going concern as and from the close of business on July 31, 1934 . . . and all trade marks and the benefit of all pending contracts in connection therewith.

B Clause 2 provided that the company should pay the vendor the sum of £10,000 on completion, and should enter into a covenant to pay to the vendor and his wife during their lives £2,500 less income tax every year. Clause 8 provided as follows:

> C . . . all commission or profits on orders executed on or before the sale date shall belong to the vendor. All orders undertaken by the vendor or in respect of which the vendor received instructions prior to the sale date but remaining unexecuted at that date shall be executed by the company as agent for the vendor and in respect of any such orders the company shall pay a sum equivalent to 25 per cent. of the gross profits or commissions arising therefrom and the remainder of such profits or commissions shall be paid to the vendor for his own absolute use and benefit.

D Clause 9 provided as follows:

> The company shall collect on behalf of the vendor all the book or other debts in connection with the said business which are reserved by this agreement to the vendor and are excluded from the sale.

E Under cl. 8, the company was to execute those orders, and was to collect the money due on them, and the vendor was to have 75 per cent. of the gross profits or commissions. It is the money so received which is in dispute between the personal representatives and the Revenue in the present case.

F Before the commissioners no evidence was called, and the whole case depended on the interpretation of the agreement, all the material clauses of which I have read. The appellants contended that the money in question was not income. The inspector of taxes contended before the commissioners that it was income because it was profits of the trade carried on by the vendor through his agent, the company, in the year G ended Apr. 5, 1935, under All Schedules Rules, r. 18. Upon that question of law, which was in no sense a question of fact, the commissioners held that the amount payable to the deceased on orders executed before July 31, 1934, under cl. 8 of the agreement formed part of the purchase price, and was a capital payment, and before them the H appeal succeeded. The Revenue appealed upon a special case and LAWRENCE, J., reversed the decision of the commissioners, holding that the moneys received were not capital, but were income. He said:

> Such sums were not instalments but were capital sums; they were the profits from a new business which the parties chose to set up, in which the company acted as the agent for the deceased. It is true that this business was connected with the

old business of the deceased but it was a new business in that it was carried on in a different way from the old business, and it neither formed part of the business sold nor were its profits included in the purchase price. The company would undoubtedly be taxable upon the 25 per cent. of the profits of such orders and could not be taxable upon the remaining 75 per cent., but I can see no reason why the deceased should not.

I entirely agree with the judge. He added that the commissioners had not found any facts inconsistent with that view, and he did not think that there was any evidence upon which they could have found that the business in connection with these orders was not a new business. Subject to one comment, I entirely agree with that judgment. It may possibly be that the agreement could be construed as excluding these orders from the sale, and the deceased was, therefore, carrying on that part of his old business until those orders were executed and paid. Whichever view one takes, the one " ground " upon which the commissioners decided—namely, that this money was capital money—is, in my view, quite clearly wrong, and the appeal must be dismissed with costs.

CLAUSON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Drake, Son & Parton* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re WALDRON'S SETTLEMENT, WALDRON AND OTHERS *v.* ERRINGTON-WALES AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), **June 12, 1940.**]

Powers—Exercise of powers—Expression of intention—Reference to property—Donee also possessing property of same description.

A testatrix had, under one settlement, a power of appointment over property including certain shares in the P. company. Under another settlement she had a similar power of appointment over certain shares in the C. company. She also owned shares in the P. company in her own right. By the settlor's will she was given a power of appointment over part of the residue of his estate. The testatrix by her will recited the power of appointment given by the settlor's will and exercised it, and made the following disposition: " I bequeath my shares in the P. Co. and my shares in the C. Co. upon trust . . ." On a summons issued to determine whether she had executed the powers contained in the settlement:—

HELD: on a conflict of authorities, the disposition was good as to the C. Co. shares, but bad as to the P. Co. shares, because, at the time of her death, she possessed property other than that over which she had a power of appointment, which answered this description in her will.

[EDITORIAL NOTE. The question in this case is whether a gift in a will of shares in a company, some of which the testator possesses in his own right while he has a power of appointment over others, is a good exercise of the power. There appears to be a conflict of authority on the point, and the judge has decided that, in the circumstances, such a gift does not operate as an exercise of the power.

As to Expression of Intention to Exercise Powers, see HALSBURY, Hailsham Edn., Vol. 25, pp. 551-553, paras. 988, 989; and for Cases, see DIGEST, Vol. 37, pp. 454-459, Nos. 556-609.]

Cases referred to:

(1) *Re Wait, Workman* v. *Petgrave* (1885), 30 Ch.D. 617; 37 Digest 456, *578*; 54 L.J.Ch. 1172; 53 L.T. 336.

(2) *Napier* v. *Napier* (1826), 1 Sim. 28; 37 Digest 459, *607*; 5 L.J.O.S.Ch. 65.

(3) *Lewis* v. *Lewellyn* (1823), Turn. & R. 104; 37 Digest 458, *593*.

(4) *Lownds* v. *Lownds* (1827), 1 Y. & J. 445; 37 Digest 455, *569*.

(5) *Rooke* v. *Rooke* (1862), 2 Drew. & Sm. 38; 37 Digest 455, *570*; 31 L.J.Ch. 636; 6 L.T. 527.

(6) *Re Gratwick's Trusts* (1865), L.R. 1 Eq. 177; 37 Digest 459, *602*.

(7) *Disney* v. *Crosse*, *Eyre* v. *Parker* (1866), L.R. 2 Eq. 592; 37 Digest 455, *571*.

(8) *Hughes* v. *Turner* (1835), 3 My. & K. 666; 37 Digest 454, *556*; 4 L.J.Ch. 141.

Adjourned Summons to determine, *inter alia*, whether the gift in the will of Ruth Marian Errington-Wales of "my shares in the Patagonian Sheep Farming Co. and my shares in the Cullen Sheep Farming Co. to my trustees" upon trusts therein declared operated as an effectual exercise of the power of appointment vested in Ruth Marian Errington-Wales under the above-mentioned settlement so far as regards her share and interest in the shares of the Patagonian Sheep Farming Co. comprised in the settlement, and whether the bequest in the will of Ruth Marian Errington-Wales of "my shares in the Patagonian Sheep Farming Co. and my shares in the Cullen Sheep Farming Co. to my trustees" upon trusts therein declared operated as an effectual exercise of the power of appointment vested in Ruth Marian Errington-Wales so far as regards her share and interest in the shares of the Cullen Sheep Farming Co., Ltd., comprised in the settlement. The facts are fully set out in the judgment.

A. C. Nesbitt for the plaintiffs.

L. M. Jopling for the first and third defendants.

J. F. Bowyer for the second defendant Richard Waldron Errington-Wales.

F. Bower Alcock for the fourth defendant, an infant.

Nesbitt stated the facts.

Jopling: It was assumed that the interest of the testatrix's two daughters was identical. Where a testator has no corresponding property of his own and shows an intention to dispose of the property subject to the power, an intention to exercise such power is implied. Similarly in *Wait's* case (1) it was held that, where a testator had property of his own as well as that subject to the power, both of which answered to the same description, a reference to that property would operate as an exercise of the power. [Counsel referred to *Lownds* v. *Lownds* (4), *Rooke* v. *Rooke* (5), *Re Gratwick's Trusts* (6) and *Disney* v. *Crosse* (7).]

Bowyer: The exercise of the power was bad. If the gift had been of Cullen shares only, it would have been good. The question was whether the testatrix intended to exercise the power, but she had Patagonian shares in her own right also, and, therefore, the rule as to implied intention failed. *Re Wait, Workman* v. *Petgrave* (1) was directly in conflict with two earlier cases, *Napier* v. *Napier* (2) and *Lewis* v. *Lewellyn* (3). [Counsel referred to *Hughes* v. *Turner* (8).]

Bennett, J.: I am dealing with the second question on the summons issued in the matter of the trusts of the will of Walter Brind Waldron and in the matter of the trusts of the settlement of Dec. 14, 1911, and with the first question on the summons issued in the matter of the trusts of the settlement of Nov. 28, 1906. It is substantially the same question which arises upon both summonses, the question being whether the testatrix, Mrs. Errington-Wales, has exercised a power of appointment given to her by each of the two settlements. The earlier settlement of 1906 was one by which the testatrix's father, Walter Brind Waldron, settled upon each of his children some shares in a company known as the Cullen Co., Ltd. The trusts were to pay the income to the testatrix during her life and after her death to stand possessed thereof :

> . . . in trust for all or any the children or child of the said Mary Elizabeth Brown at such ages or times or age or time not being earlier in the case of sons than on their attaining the age of 21 years or in case of daughters than on their attaining that age or marrying in such shares if more than one and in such manner as the said Mary Elizabeth Brown shall whether covert or sole by deed or will appoint [with trusts over in default of appointment].

By the second of the two settlements, dated Dec. 14, 1911, the testatrix's father, Walter Brind Waldron, settled upon his daughter some shares in the Patagonian Sheep Farming Co. (1908), Ltd., upon substantially the same trusts—namely, trusts under which his daughter, the testatrix, enjoyed the income during her life, and had a power of appointing the shares amongst her children. In addition to her interest in the shares in the Patagonian Sheep Farming Co. (1908), Ltd., the testatrix had shares of her own in that company which were not subjected to any trusts, and which she was free to dispose of in such way as she thought fit. In those circumstances, she made her will. In addition to having those two powers of appointment given to her by the two settlements, she had a power of appointment, given to her by her father's will over the residuary estate of her father, or part of it, which was held in trust for her by the trustees of his will. That is a fact which I think must be borne in mind in determining the questions which arise upon the two summonses. She exercised the power of appointment given to her by her father's will, having in her own will recited the father's will which gave her the power of appointment. Before she exercised that power, her will contains these dispositions :

> I bequeath my shares in the Patagonian Sheep Farming Co. and my shares in the Cullen Sheep Farming Co. to my trustees upon trust to pay the annual income to arise from one half part thereof to my said daughter Dorothy Errington Errington-Wales during her life without power of anticipation and from and after her decease to stand possessed of the capital and income of such one half part upon trust to pay

> the whole or any part of the income to any husband of my said daughter who shall survive her if she shall by her will so appoint for his life or for any less period and subject as aforesaid to stand possessed of the capital and income of such one half part or share upon trust for all such one or more exclusively of the other or others of the children or other remoter issue of my said daughter . . . and in default of and until and subject to any such appointment upon trust for all the children or child if only one of my said daughter respectively who attain the age of 21 years and if more than one in equal shares and in case my said daughter shall die without having any child who shall become an object of the last-mentioned trust then the said one half part or share shall be held upon trust for such person or persons and in such manner in all respects as my said daughter shall by will appoint and in default of such appointment and so far as any such shall not extend upon trust for the next of kin of my said daughter and as to the other half part or share thereof upon similar trusts for my daughter Ruth Margaret Von Lupkovics as those declared for my daughter Dorothy Errington Errington-Wales' share.

The question is whether those dispositions are to be construed as an execution by the testatrix of the powers contained in the two settlements over the shares in the Patagonian Sheep Farming Co. (1908), Ltd., and the shares in the Cullen Co., Ltd. Where there is a question as to whether or not an instrument is one which shows an intention to execute a power, the general rule is stated in FARWELL ON POWERS, 3rd Edn., p. 201, as follows :

> The instrument must either refer to the power or to the property subject to the power ; or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power.

If the testatrix had no shares in the Patagonian Sheep Farming Co. (1908), Ltd., in her own right, and if the only shares in which she had an interest were the shares the subject of the settlement of Dec. 14, 1911, the case would have presented no difficulty at all. The conclusion, I think, must have been that the testatrix had exercised the powers contained in the two settlements because she had referred to the property subject to the powers, and, unless the words in her will were idle, they could have had no operation at all except as words executing the powers. The difficulty arises because, so far as the Patagonian Sheep Farming Co. (1908), Ltd., is concerned, the testatrix owned shares which were not the subject of the settlements.

In a case such as this, there seems to be a conflict between the decision of PEARSON, J., in *Re Wait, Workman* v. *Petgrave* (1) and two earlier decisions, one in *Napier* v. *Napier* (2), a decision of SIR JOHN LEACH, and the other in *Lewis* v. *Lewellyn* (3). Unfortunately, *Napier* v. *Napier* (2) and *Lewis* v. *Lewellyn* (3) do not seem to have been referred to when *Re Wait, Workman* v. *Petgrave* (1) was being argued before PEARSON, J., and I think I am put in a position in which I have to choose between following the decision of PEARSON, J., or that in *Lewis* v. *Lewellyn* (3). I think that I ought to follow the earlier one of those two cases. I have in mind what SIR JOHN LEACH said in *Napier* v. *Napier* (2), at p. 37 :

> In cases of this nature it is to the advantage of the public to abide by decision, unless that decision is corrected by the court of ultimate resort.

The court of ultimate resort will be either the Court of Appeal or the

House of Lords, who decide which is the right view. Having that in mind, in this case I am bound, I think, on principle, to hold that the testatrix has executed the power conferred upon her by the settlement of Nov. 28, 1906, and has made an appointment of the Cullen Co. shares. To hold otherwise would be to decide that the disposition of the Cullen shares made by the testatrix in her will was wholly inoperative. I am bound by the decision in *Napier* v. *Napier* (2) to hold that the testatrix has not exercised the power of appointment contained in the settlement of Dec. 14, 1911, because, when she died, she was possessed of property which answered the description in her will of " my shares in the Patagonian Sheep Farming Co.," and the decision of Sir John Leach is that in such a case the power is not well executed.

Solicitors : *Neve, Beck & Crane* (for the plaintiffs) ; *Field, Roscoe & Co.* (for the defendants).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

HARLING *v.* CELYNEN COLLIERIES WORKMEN'S INSTITUTE.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **July 2, 1940.**]

Income Tax—Deductions against profits—Loss—Carrying forward of loss—" Six following years of assessment "—Finance Act, 1926 (*c.* 22), *s.* **33** (1).

The respondents sustained a loss in the year ending Dec. 31, 1930, which formed the basis of assessment for the year Apr. 5, 1931, to Apr. 5, 1932, and sought relief under the Finance Act, 1926, s. 33, by carrying forward and deducting the unexhausted balance of this loss from the profits in the year of assessment 1937-38. The inspector of taxes contended that, as, under the section, relief was allowable " as far as may be " for the 6 years following the year of loss, but no further, no part of this loss could be carried forward and deducted from profits after the year 1936-37 :—

Held : upon the proper construction of the Finance Act, 1926, s. 33 (1), the words " the 6 following years of assessment " included the year in which the loss formed the basis of assessment, and the respondents were not, therefore, entitled to deduct the balance of this loss from the profits for the year 1937-38.

Decision of Lawrence, J. ([1940] 2 All E.R. 471) *reversed.*

[EDITORIAL NOTE. The Finance Act, 1926, s. 33 (1), allows the carrying forward of losses for the 6 following years of assessment. The only question here is the construction of the phrase " for the 6 following years of assessment," with particular reference to the last year in which it is possible to set off a loss so carried forward.

As to Carrying Forward of Loss, see HALSBURY, Hailsham Edn., Vol. 17, pp. 332, 333, paras. 666, 667 ; and for Cases, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233-236.]

Case referred to :

(1) *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143 ; Digest Supp. ; 97 L.J.K.B. 342 ; 138 L.T. 600 ; 13 Tax Cas. 400.

APPEAL by the Crown from a judgment of LAWRENCE, J., dated Mar. 20, 1940, and reported [1940] 2 All E.R. 471, where the facts are fully set out.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the appellant.

Frederick Grant for the respondents.

The Solicitor-General: Down to 1926, income tax was paid upon the average profits of the 3 previous years. If a man made money in 3 years, but had a loss in the fourth year, he could claim to pay nothing in that particular year. In 1926, it was decided to base the assessment, not upon the average of the 3 previous years, but upon the actual preceding year, and it was no doubt right to give a further relief in respect of loss. One is now entitled to relief for the six following years. The problem arises on the meaning of the word "following." The point is whether it is six years following the year of loss, or six years following the year of assessment which follows the loss. The Income Tax Act, 1918, s. 237, defines "year of assessment" as the year for which such tax was granted by any act granting duties of income tax. So far as the law before the Finance Act, 1926, came into operation was concerned, although relief was given in respect of the year of the loss, there was no right to carry forward the loss. When the 1926 Act abolished the 3 years' average, a right was given by sect. 33 to carry forward the loss for six years. For the respondents, it is claimed that these must be six effective years and it is said, on their behalf, that by starting immediately after the loss, there are only five effective years, because the first year afterwards will be the year of assessment. If that construction were right and the year after the loss was omitted, it would work great hardship to other taxpayers. [Counsel referred to *Ormond Investment Co., Ltd.* v. *Betts* (1).]

Hills followed on the same side.

Grant: The years which follow must be the years which follow the year of the computation of the tax. Where there has been a loss in an accounting period, say 1930, that period is the period for the assessment in the year 1930-31. If there has been a loss, the assessment for the year is nil. In the year in which a loss has been made, no relief is obtained. The first year after the loss is one of the following years. A loss cannot be carried forward into a year in which there is a nil assessment. The loss can be set off for six years and the first year is the year in which subsequent profits can be used as a basis for assessment. The six years are not to begin until there is a year which is effective. The first year of the six is the first year in which some relief can be obtained.

SCOTT, L.J.: This appeal raises a question as to the correct interpretation of the Finance Act, 1926, s. 33 (1). It was that Act, it will be remembered, which abolished the previous basis of assessment of

3 years' average profits and by sect. 29 substituted for it the preceding year. The words are :

> . . . the full amount of the profits or gains or income of the year preceding the year of assessment.

In regard to losses, which are really the subject-matter of this appeal, there had been certain provisions before the Act of 1926 to which it is unnecessary to refer at all, but by sect. 33 (1) of the Act of 1926 it was enacted that, where a person has in any trade sustained a loss, he may claim that any portion of the loss for which relief has not been given under certain sections of the previous legislation shall be carried forward, and, as far as may be, deducted from, or set off against, the amount of profits or gains on which he is assessed under Sched. D in respect of that trade for the 6 following years of assessment. It is on the interpretation of those last few words "for the 6 following years of assessment" that this appeal turns.

The question in the case was whether or not the taxpayer was entitled to begin the counting of "the 6 following years of assessment," not from the year in which he had sustained the loss, but from the year of assessment in respect of his tax liability, which was in the year following the year of loss. In 1929, he had made a profit during that calendar year which was the accounting period for his assessment for the tax year 1930-31. In the next calendar year, he had made a loss, which would come forward for consideration for the purposes of taxation in the year of assessment 1931-32. Under the specific provisions of sect. 29, to which I have referred, the assessment for the year 1931-32 would necessarily be nil.

The taxpayer has contended, and the judge below has decided, that the period of 6 years referred to in sect. 33 (1) runs, not from the year of loss, which was 1930, but from the year 1931-32, which was the tax year of assessment into which that loss in 1930 would come forward for consideration. The Crown, on the other hand, have contended that the natural meaning of the provision in sect. 33 (1) is that the 6 following years are the years of assessment following after the loss, and not the 6 years which follow after the year in which that loss would come forward for consideration by the taxing authorities, and result in an assessment of nil. That is the very short issue in this case, and it depends solely upon the true construction of sect. 33 (1). In my opinion, the judge erred in his construction of the words as referring to the 6 years following after the year of assessment in which the loss came up for consideration—namely, the next year, the assessment depending in that year on the result of the accounts of the year preceding that year of assessment. That interpretation depends, in my view, upon the tacit introduction into the language of subsect. (1) of words which are not there. To my mind, a perfectly clear meaning can be given to the words actually used as they stand, and, if that is so, that meaning must be given to them under the ordinary principles of statute interpretation. I see no justification for introducing into those words by implication a reference to the year in which the loss came up for consideration when the only *terminus a quo* indicated in the section is the year in which the person has sustained a loss in his trade. The section begins by referring to that year, and, in my view, to push forward the 6-years period by introducing before it should begin the year in which the loss came up for consideration is to introduce into the section words which the section does not contain.

The Solicitor-General presented us with arguments based upon other provisions of the Income Tax Acts, which are in every case to be read as a whole, and he said that the interpretation which I have adopted was one which still left room for losses in the next year after the last in certain cases to be brought into account for the benefit of the taxpayer. To my mind, those considerations are not truly relevant to the wording of the section, for the section says that the right of carrying forward a loss so as to deduct it from, or to set it off against, profits or gains is one which is to be exercised "as far as may be," and those limiting words are important. The Solicitor-General also referred us to a section of the Act of 1932 which bears out the interpretation which I have put upon sect. 33 of the Act of 1926, but I do not think it necessary to discuss the value of that incorporation for the purpose of interpretation, as, in my opinion, the words of sect. 33 (1) are quite clear in themselves. Therefore, in my view, the appeal should be allowed.

Clauson, L.J.: I agree.

Goddard, L.J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Collyer-Bristow & Co.*, agents for *D. Granville West*, Newbridge (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* OLDHAM.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **July 4, 1940.**]

Estate and Other Death Duties—Gifts inter vivos—Gift of ordinary shares—Issue of bonus shares to ordinary shareholder on capitalisation of reserves—Whether estate duty payable in respect of bonus shares—Customs and Inland Revenue Act, 1881 (*c.* 12), *s.* 38 (2)—*Customs and Inland Revenue Act*, 1889 (*c.* 7), *s.* 11 (1)—*Finance Act*, 1894 (*c.* 30), *ss.* 1, 2 (1) (*c*), 7 (5), 22 (1) (*f*)—*Finance* (*1909-10*) *Act*, 1910 (*c.* 8), *s.* 59 (1).

On Jan. 26, 1934, the defendant's father gave to his daughter, the defendant, 25,000 shares in T. & L., Ltd. On May 9, 1935, the company capitalised £1,360,000 out of its general reserve by issuing 1,360,000 new ordinary shares to the ordinary shareholders in the proportion of 2 such shares for every 5 existing shares, with the result that the defendant was allotted 10,000 further ordinary shares. The defendant's father died on Apr. 30, 1936, and the Crown claimed that estate duty was then payable under the Customs and Inland Revenue Act, 1881, s. 38 (2) (as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), and the Finance (1909-10) Act, 1910, s. 59 (1)), and the Finance Act, 1894, s. 2 (1) (*c*), in respect of both the 25,000 and the 10,000 shares. The defendant admitted that duty was payable in respect of the 25,000 shares, but contended that it was not so payable in respect of the 10,000 shares:—

Held: the 10,000 shares which the company chose to distribute to the defendant were not taken by her under the gift of the ordinary shares on Jan. 26, 1934, and, therefore, estate duty was not payable in respect of them upon the death of the defendant's father. Where the parties have clearly and truly stated the nature of the transaction, what may be said to be the substance of the transaction ought not to be regarded.

Decision of Wrottesley, J. ([1940] 2 All E.R. 321) *affirmed.*

[**EDITORIAL NOTE.** The decision in this case must be compared with that in *Re Payne, Poplett* v. *A.-G.* (1). The matter which has to be determined in each case is what, upon its proper construction, passed under the deed of gift. Increments to a gift can more readily be traced where there is a trust fund, for then all such increments will be held by the trustees as part of the fund. The decision here, however, is based upon the construction of the taxing statute, and it is held that the definition of the property charged with the duty does not include the bonus shares here in question.

As to Estate Duty on Gifts *Inter Vivos*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 269-273, paras. 272-280; and for Cases, see DIGEST, Vol. 21, pp. 24, 25, Nos. 133-137.]

Cases referred to:

(1) *Re Payne, Poplett* v. *A.-G.*, [1940] Ch. 576; [1940] 2 All E.R. 115; Digest Supp.

(2) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

(3) *Re Speir, Holt* v. *Speir*, [1924] 1 Ch. 359; 40 Digest 661, *1988*; 93 L.J.Ch. 225; 130 L.T. 564.

(4) *Strathcona* (*Lord*) v. *Inland Revenue Comrs.*, [1929] S.C. 800; Digest Supp.

(5) *Re Leeming, Turner* v. *Leeming*, [1912] 1 Ch. 828; 44 Digest 411, *2426*; 81 L.J.Ch. 453; 106 L.T. 793.

(6) *Re Kuypers, Kuypers* v. *Kuypers*, [1925] 1 Ch. 244; 40 Digest 661, *1997*; 94 L.J.Ch. 253; 133 L.T. 468.

APPEAL by the informant from an order of WROTTESLEY, J., dated Feb. 23, 1940, and reported [1940] 2 All E.R. 321, where the facts are fully set out.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the appellant.

R. F. Roxburgh, K.C., and *F. Heyworth Talbot* for the respondent.

The Attorney-General : The question arises under a group of sections which the court had recently to consider in the case of *Re Payne, Poplett* v. *A.-G.* (1). They are a group of sections by which a gift of property taken within 3 years of the death of the donor becomes subject to death duties. What one looks at is the original gift, and, if at the date of the death something has been substituted for the original gift or has grown out of it, one values what one finds at the date of the death, no matter whether there has been substitution or whether there is a formal identity plus that which has grown out of the gift. The construction of the word " property " in sect. 38 (2) (*a*) of the 1881 Act should cover the issue of bonus shares issued in respect of shares given within 3 years of the death. It is only by doing so that one can give effect to the substance of what is given. I base that upon the principle that when the property is valued, what one values is the original gift together with any accretion which has come to it, or, in substitution cases, anything which has been substituted for the original gift without loss of identity. [Counsel referred to *Inland Revenue Comrs.* v. *Blott* (2), *Re Speir, Holt* v. *Speir* (3), *Strathcona* (*Lord*) v. *Inland Revenue Comrs.* (4), *Re Leeming, Turner* v. *Leeming* (5) and *Re Kuypers, Kuypers* v. *Kuypers* (6).]

Stamp, following on the same side : In *Re Kuypers, Kuypers* v. *Kuypers* (6) the issue of the new shares was not at the expense of the old shares. In the present case, it is quite clear that the respondent received the shareholding from her father. The 2 bonus shares issued in respect of every 5 shares were taken under the gift from the father. It is necessary to look at the substance of the matter and not at the form. Where a property changes its form by growth from within, one takes its value at the date of the death. The investment may be changed into cash. In that event, the cash represents the property which was originally taken. In finding the identity, it is necessary to look at the substance behind the legal form. One is not concerned with finding formal identities, but one must have regard to the natural development of the things.

Counsel for the respondent were not called upon.

SCOTT, L.J. : This appeal turns on the question whether or not certain bonus shares distributed to a person who was a donee from her father of certain shares in a company are to be included in the shares so given as a part of the property which, under the Finance Act, 1894, s. 2, and the Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*), is to be deemed to have passed upon his death, which occurred within 3 years of the gift of the shares. The question really turns on the meaning of the word "property" in the Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*). The judge has given a very careful judgment, and has come to the conclusion that it is impossible to say as a matter of statute interpretation, even applying the rule that the court must look at the substance, and not merely at the form, that, in the circumstances of this case, those bonus shares come within the meaning of the "property" the subject of the gift—namely, the original shares presented. I agree with the reasoning of the judge, and do not feel that I can add anything to its cogency. I adopt his judgment as my own, and think that the appeal must be dismissed with costs.

Clauson, L.J.: I agree. All I would add is that in the present case the 25,000 shares given to the daughter by the father remained, at the date of the father's death, in being and in her hands, and wholly unchanged. Accordingly, there is no difficulty whatever in identifying the subject-matter of the gift. It is true that, between the time of the gift and the time of the death, the daughter, by virtue of her shareholding, acquired some further shares, but they were not the subject-matter of the gift.

We have had a very interesting discussion of possible cases in which the subject-matter of the gift at the date of the death no longer exists in the shape or form in which it was at the time of the gift. Accordingly, we have heard a discussion of cases which involve a number of interesting and difficult points as to identification of the subject-matter of the gift with something which exists at the date of the death, which points do not arise in a case where the original subject-matter of the gift remains unaltered. In my judgment, it is quite unnecessary, for the purposes of this case, to form any view as to those other possible cases. As far as the present case is concerned, I can see no answer to the reason contained in the last paragraph of the judgment of Wrottesley, J. Therefore, I agree that the appeal must be dismissed.

Goddard, L.J.: I agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Pennefather & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

GORMAN *v.* BARNARD.

[COURT OF APPEAL (Scott, MacKinnon and Clauson, L.JJ.), **February 9, 12, June 24, 25, July 8, 1940.**]

Criminal Law—Arrest without warrant—Charge of harbouring uncustomed goods with intent to defraud—Accused suspected of having committed offence—"Offender"—Customs Consolidation Act, 1876 (*c.* 36), *ss.* 186, 197, 199, 202, 203, 205, 221, 224, 229, 233, 267.

The appellant, a ship's steward, arrived in Liverpool on July 4, 1938, from Burma. The two respondents were preventive Customs officers. On July 5, they detained the appellant, took him to the police court, and there charged him with knowingly harbouring uncustomed goods, consisting of a box of cigars, with intent to evade the payment of duty thereon, contrary to the Customs Consolidation Act, 1876, s. 186. He was detained in custody for some hours before being released on bail. He came before the Liverpool stipendiary magistrate on July 7, when the charge was dismissed. The appellant then commenced proceedings to recover damages for malicious prosecution and false imprisonment. It was contended that, on its true construction, the Customs Consolidation Act, 1876, s. 186, authorised the detention of a person suspected of offending against the section but not in fact guilty of the offence:—

HELD (MACKINNON, L.J., *dissenting*): the word "offender" in the Customs Consolidation Act, 1876, s. 186, means an actual offender, and the section does not authorise the arrest of an alleged or suspected offender. The appellant was, therefore, entitled to succeed in his claim for false imprisonment.

[**EDITORIAL NOTE.** In the case of an offence of the type here in question, the authorities can proceed by way of arrest or by way of summons in the police court. The question is whether they can, under the terms of the Act, justify an arrest where the accused is subsequently found not guilty. It was contended that they could do so if they proved that they had reasonable grounds for suspecting the commission of the offence, but it is held that the proper construction of the Act is that the power of arrest is restricted to cases where the offence is in fact committed.

AS TO POWER OF ARREST WITHOUT WARRANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 89-95, para. 119; and FOR CASES, see DIGEST, Vol.14, pp. 183-186, Nos. 1617-1660.]

Cases referred to:

(1) *Trebeck* v. *Croudace*, [1918] 1 K.B. 158; 14 Digest 183, *1622*; 87 L.J.K.B. 272; 118 L.T. 141.

(2) *Isaacs* v. *Keech*, [1925] 2 K.B. 354; Digest Supp.; 94 L.J.K.B. 676; 133 L.T. 347.

(3) *Ledwith* v. *Roberts*, [1937] 1 K.B. 232; [1936] 3 All E.R. 570; Digest Supp.; 106 L.J.K.B. 20; 155 L.T. 602.

(4) *Bowditch* v. *Balchin* (1850), 5 Exch. 378; 14 Digest 183, *1619*; 19 L.J. Ex. 337; 15 L.T.O.S. 232.

APPEAL by the plaintiff from an order of the presiding judge, Liverpool Court of Passage, dated June 17, 1939, dismissing an action for malicious prosecution and false imprisonment brought against the defendants, who were customs preventive officers. The facts are fully set out in the judgment of SCOTT, L.J.

D. N. Pritt, K.C., and *M. Turner-Samuels* (for *J. Glyn Burrell* on war service) for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *Valentine Holmes* and *H. P. J. Milmo* for the respondents.

Pritt, K.C.: The word "offender" in the Customs Consolidation Act, 1876, s. 186, means the person who has committed the offence, or the person who is believed by the officer detaining him to have committed the offence. The question is whether or not the officers had reason to believe that the appellant had committed the offence with which he was charged. Neither of the officers went into the witness-box and said that he believed the truth of the charge. At the moment when the appellant was arrested, there was no evidence that he was the owner of the cigars, and there was very little evidence that he was in possession of them. There was no evidence that he had been guilty of harbouring them, and there was no evidence of intent to defraud. Sect. 186 does not permit the detention of any person unless that person has in fact committed the offence. In *Ledwith* v. *Roberts* (3), it was held, under the statutes in question, that, before a man could be arrested, it was necessary to classify him. *Trebeck* v. *Croudace* (1) and *Isaacs* v. *Keech* (2) show that, when a statute gives a police constable power to effect an arrest, and the nature of the offence is such that, if the police officer does not act quickly, damage will result, there is power to detain a person guilty of an offence, or thought to be guilty of an offence. Where, however, as in the present case, the offence is one in which there is no element of disorder or need for haste, and the money can be collected on the following day, there is no need to read into the statute a power to interfere with the liberty of the subject. There is nothing in the present case which compels the court to read into the statute a right to detain. In construing a statute, the ordinary rule is not to read unnecessary words into it, particularly where the liberty of the subject is concerned. It was not necessary in *Ledwith* v. *Roberts* (3) for the court to say that it was overruling *Isaacs* v. *Keech* (2). It is necessary to find an intent to defraud as distinct from the act of knowingly harbouring.

The Attorney-General: In dealing with smuggling offences, one is dealing with people who may disappear from the venue altogether. The word "offender" in the last line but one of sect. 186 means suspected offender, and the word "offence" means suspected offence. The sense must be in accordance with the context. *Trebeck* v. *Croudace* (1) shows that words apparently categorical and unambiguous may mean a person who, at the time he is arrested, is believed to be guilty. In *Trebeck* v. *Croudace* (1), the words of the relevant Act, in their natural meaning, are only capable of meaning an actual offence. Parliament has said that a power to make summary arrest is necessary. Therefore, the people who have the duty of making that arrest ought not to have to act at their peril. In the Indictable Offences Act, 1848, s. 10, the

word "offender" is used to include people suspected of being guilty. The Customs Consolidation Act, 1876, s. 224, also applies to an offence which has not been proved. Smuggling is an offence for which one would expect to find that summary powers of detention have been given. Sect. 191 of the 1876 Act also supports the view that the powers of arrest
A must be construed as being exercisable on reasonable cause. It is perfectly consistent with mild penalties that there should also be a power of detention. The principle of *Trebeck* v. *Croudace* (1) applies to the present case. In *Isaacs* v. *Keech* (2), it was held sufficient that the constable honestly and on reasonable grounds believed that the offence
B was being committed. [Counsel referred to *Ledwith* v. *Roberts* (3).]

Pritt, K.C., in reply: *Prima facie*, there has been a trespass, and it lies upon the defendants to justify it. The defendants must show some statutory authority, or fail. A statute which says nothing about the prosecutor's state of mind should be construed in favour of the subject.
C In the 1876 Act, the power to detain is curiously limited. There are formidable offences in respect of which there is no power to detain. Sects. 84 and 85 provide examples of this. Sect. 179 is the first section in the Act to give anybody a right to detain a person. There is really nothing very special about smuggling, and persons who do it are not
D more elusive than persons who commit other crimes.

SCOTT, L.J.: This is an appeal from a judgment of SIR FRANCIS TAYLOR, as presiding judge of the Court of Passage of the City of Liverpool, dated June 17, 1939, in favour of the defendants, the present
E respondents. The action was brought by the plaintiff claiming damages for malicious prosecution and false imprisonment, and the judge, although deciding in favour of the defendants on both issues, provisionally fixed the damages for the two causes of action at £75. It was neither pleaded nor contended that the plaintiff had in fact committed the offence.

F On the appeal before us, counsel for the appellant was content to accept the decision of the court below upon the claim for damages for malicious prosecution. At the conclusion of the appeal, both counsel for the appellant and counsel for the respondents agreed that this court should deal with the *quantum* of damages as it thought fit, if it allowed the
G appeal on the issue of false imprisonment. In the circumstances of the case, we think that the sum of £25 out of the £75 may properly be treated as having been allocated by the judge to the issue of false imprisonment.

The appellant, to whom I will refer as the plaintiff, was a ship's steward on board the British Freedom, which arrived in Liverpool on July 4, 1938,
H from Burma. The two defendants were preventive Customs officers. On July 5, they detained the plaintiff, took him to the police court, and there charged him with knowingly harbouring uncustomed goods, consisting of a box of cigars, with intent to defraud His Majesty of the duties thereon, contrary to the Customs Consolidation Act, 1876, s. 186. He was detained in custody for some hours, but was released on bail at

6.40 p.m. He came before the Liverpool stipendiary magistrate on July 7, when the charge was dismissed. By writ issued on Dec. 15, 1938, the plaintiff claimed damages for malicious prosecution and false imprisonment. The defence was that the two defendants had formed the opinion on reasonable and probable grounds that he had committed the offence, and that that *bona fide* belief afforded them a defence in law to the action of false imprisonment.

Particulars were given of that defence, and the facts stated in the particulars were treated by counsel for the plaintiff at the trial as common ground. The judge held that those facts did constitute a reasonable and probable cause, and, upon that view, dismissed, not only the claim for damages for malicious prosecution, but also that for damages for false imprisonment. No witness except the plaintiff was called on either side.

The facts so pleaded or proved by the plaintiff in the witness-box were these. He had bought the cigars in Rangoon, and kept them lying on a spare bunk in the cabin where he slept, till between 10 a.m. and 11 a.m. on July 4, 1938, the ship having arrived alongside the quay at 4 a.m. At 6 a.m., Customs officers boarded the ship, and at 6.20 a.m. the usual Customs list, No. 142, was signed by the plaintiff and one Rioch, an apprentice 18 years old. The document was headed :

> Notice to masters and officers and crews of vessels regarding goods brought as their private property from abroad.

Para. 1 states as follows :

> This form must be completed in readiness to be handed to the officer of Customs and Excise who first visits the vessel. It must be signed by each member of the crew (including the master and officers) who must state opposite his signature the quantity of dutiable goods in his possession. If he has nothing he must state "nil" or "nothing."

Para. 3 states as follows :

> Any dutiable, prohibited or restricted articles the property of any member of the crew, found in the vessel and not declared will be liable to forfeiture and the owner thereof will be liable to prosecution.

The columns for the signature, rank and particulars of goods are headed thus :

> To the principal officer of the Customs and Excise, Liverpool. We, the undersigned master, officers and members of the crew of the British Freedom from . . . declare that we have in our possession, respectively, as our private property the quantities, and no more, which we have respectively placed opposite our signatures and we severally undertake that none of the goods shall be landed without authority of the proper officer of Customs and Excise.

When the defendant Customs officers were rummaging in the ship, they found the box of cigars hidden under a mattress and above the boards of a bunk in an unoccupied stateroom. The apprentice, Rioch, told the defendant Potter that the cigars had been bought at Rangoon by the plaintiff, but that he had agreed to buy them from the plaintiff for 5*s.*, and that at about 10.30 a.m. on July 4 the plaintiff had handed them to him, and that he had concealed them where they were found by the Customs officer. The plaintiff admitted to the defendant Potter that the cigars had been in his possession until that time, and stated that he had agreed to sell the box to Rioch for 5*s*., the money to be paid when the ship was paid off. Neither the plaintiff nor Rioch had declared the cigars, either in Customs list 142 or by word of mouth, but each had signed the list after entering " nil " in the column for cigars. The signatures to the form followed the printed declaration saying :

> We the undersigned members of the crew . . . declare that we have in our possession respectively as our property the goods described opposite the signatures.

As the judge said in his judgment, if the story of the sale to Rioch were true, the plaintiff had no duty to declare them, as they were not his property, and Rioch had no such duty, as they were not in his possession. In the witness-box before the judge, the plaintiff said that, when he handed the box to Rioch at 10.30 a.m. or 11 a.m. on July 4, he said to Rioch : " Whatever you do, declare them." He did not, however, tell the Customs officers that he had given that warning to Rioch. The judge said of the plaintiff :

> I had the plaintiff under observation in the witness-box for a considerable time, and he made a most unfavourable impression. As a judge of fact, I could not accept his account. I remember that he had been acquitted, and I am bound to regard him as innocent of the offence. I think, however, that the defendants had reasonable grounds for not accepting his story of the sale, and it is permissible to infer from their act in arresting him that they did not accept it. The plaintiff did not tell the defendants that he said to Rioch, " Whatever you do, declare them," and this was said after the declaration had been signed by Rioch. If the story was not accepted, the defendants had reasonable grounds for believing that the cigars were his property and in his possession when he signed the declaration, and, therefore, they had reasonable grounds for believing that he had committed the offence. If a jury had tried the case, they must have been influenced, as I was, by his demeanour in the witness-box.

If the judge was dissatisfied with the plaintiff as a witness and did not trust his evidence, the Customs officers may well have received a similar impression, and I am not prepared to differ, on the facts in evidence, from the judge's conclusion that the Customs officers had reasonable or probable ground for disbelieving the plaintiff's story. The concealment of the cigars under the mattress was obviously deliberate, and the Customs officers may well have had regard to the fact that Gorman, the older man, had kept the cigars in his possession till the last minute, and concluded that he thought it safer for his own purpose to entrust them to the apprentice. The judge definitely thought that they were justified in disbelieving the story of the sale, and, having regard to the plaintiff's demeanour, I think that this court ought to accept the judge's finding of fact.

In the court below, the case seems to have been argued for the plaintiff on the hypothesis that suspicion on reasonable grounds would justify the detention of the plaintiff. There is no trace in the judge's judgment of any discussion having taken place at all on the meaning of the word " offender " in sect. 186, which is the critical question in the case. At common law, not even a constable or other police officer—and *a fortiori* not a Customs officer—would have had any right to arrest the plaintiff, even if it be assumed that the offences with which he was charged would constitute a misdemeanour. Consequently, it was essential for the defence to be able to point to a definite statutory provision authorising the arrest in question. The section relied on by the respondents before us was the section under which the charge was made in the police court—namely, the Customs Consolidation Act, 1876, s. 186. That is a long section, and it is not necessary to quote the whole. The relevant parts of it are these:

> Every person who shall import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not . . . or shall knowingly harbour, keep, or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods . . . or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or application to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons.

Counsel for the appellant did not dispute that there was evidence of somebody knowingly harbouring or concealing the cigars with intent to defraud His Majesty of duties, but he submitted that the final words of the section, "and the offender may either be detained or proceeded against by summons," did not authorise the detention of a person suspected of offending but not in fact guilty of the offence. In aid of his construction, he pointed to the preceding sentence, which provided that for each such offence the person in question should forfeit treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs. It was obvious, he submitted, that the fine could not be imposed except for offences actually committed, and the word "offender" must be construed on a comparable footing as limited to an actual offender, and not as referring to a person erroneously suspected of offending. In my view, this argument is well-founded, and I should have been content to limit my judgment to that ground. However, counsel for the respondents contended that the word "offender" must be construed to include, not only an alleged offender, but also a suspected offender as well as an actual offender or a convicted offender, and to establish this interpretation he relied on various other sections of the same Act and two decisions, one of the Court of Appeal and the other of a Divisional Court, for the purpose of showing that the word both could be, and, in the context of the Customs Consolidation Act, ought to be, construed so as to include such wider meaning. I have given careful consideration to his argument and to each of the sections to which he referred us, but I am not convinced. It is right, however, that I should state the affirmative reasons which have satisfied me that his construction should not be put upon sect. 186.

The first is the natural English meaning of the word " offender " in its context in the section. In my opinion, the contention of counsel for the appellant on that is sound. I put the reasoning thus. Just as the goods may be forfeited and a fine of £100 inflicted for " the offence " of harbouring, so the person, who has exposed himself to that fine by committing the offence may be detained. Unless the word " offender " can be construed as covering a suspected offender, the question of reasonable and probable ground for the suspicion does not arise. In my opinion, the natural meaning of the word by itself is " a person who has committed an offence." If the Customs officer suspects, but does not feel sure, the section tells him what to do. He is to proceed against the person he suspects and to charge him with the offence on a summons in the police court. No doubt, when the noun " offender " is followed by the words " may be proceeded against by summons," it must be construed as meaning the person to be charged with the offence in the summons, but that is no reason for supposing that the legislature intended that meaning where it gave power to detain on suspicion. That " offender " in that context means " a person who has committed the offence " is borne out by sect. 199, which provides as follows :

> If any person liable to be detained under the Customs Acts shall not be detained at the time of committing the offence, or being detained shall escape, he may afterwards be detained at any place in the United Kingdom within 3 years from the time such offence was committed . . .

This seems to me conclusive that in sect. 186 " the offender " does mean " the person who has in fact committed the offence." If there be still (contrary to my view) any doubt as to the meaning of the word " offender " in sect. 186 in relation to the power of detention, the fact that a few sections later in the same group of sections relating to the " Prevention of Smuggling " (sects. 169-217) powers of acting upon " reasonable suspicion " are conferred in express terms (sects. 203, 205) is sufficient to forbid any straining of the natural meaning of the word in sect. 186, and those two sections follow immediately on sect. 202, which refers to " all persons liable to be detained for any offence," and confers power on a variety of persons to seize or detain them anywhere on land or water. It surely cannot be supposed that the legislature intended such a power to be exercised except in strict compliance with the powers of arrest under the particular provisions of the Act which made them persons originally liable to arrest. Lastly, sect. 267 contains two provisions which show beyond doubt that the powers conferred by earlier sections authorising the seizure of smuggled goods must have been limited to cases where a smuggling offence had actually been committed, and could not have extended to cases of unfounded suspicion, however " reasonably or probably " grounded—for instance, the offences enumerated in

sect. 186, for which liability to forfeiture and fine is there imposed. The first provision enables a judge in an unsuccessful proceeding by the Crown to enforce a forfeiture to give a certificate that the seizing officer had reasonable or probable cause for his seizure, and enacts that the certificate shall serve as an absolute protection to the seizor against proceedings against him. The second provision protects the seizor in any A
action against him for wrongful seizure against any but nominal damages if the judge holds that there was reasonable or probable cause for the seizure. The section invites one further comment. It gives no similar protection to the defendant officer in an action for false imprisonment. That cause of action is left unaffected, being only limited on the usual B
lines of the protection of public authorities by sects. 268-272, which were repealed by the Public Authorities Protection Act, 1893, which then took their place.

If, in spite of the corroboration of the natural construction of sect. 186 afforded by other sections of the same Act, it still be thought that there C
is any doubt left about the meaning of sect. 186, the long list of statutes authorising arrest cited in HALSBURY, Hailsham Edn., Vol. 9, pp. 89-94, deserves attention. They might be divided up into various categories, but for present purposes I divide them into two main categories—namely, (i) those which confer a power of arrest where the offence is in D
fact committed, in most of these statutes the offence being one which is actually witnessed by the person authorised to arrest, or is otherwise patent, and (ii) those where the power is expressly given on reasonable suspicion, for example, the Naval Deserters Act, 1847, s. 9, the Larceny Act, 1861, s. 103, the Pawnbrokers Act, 1872, s. 34, the Explosives Act, E
1875, s. 78, and the Army Act, s. 154. I limit my instances to those statutes enacted before 1876. There has been held by the Court of Appeal to be a third type, which is in its nature an exception from the first category. The decision in question is *Trebeck* v. *Croudace* (1), where a driver of a motor car in a public thoroughfare was arrested under F
the Licensing Act, 1872, s. 12, which contains a power to apprehend a person in charge of a carriage on a highway if he is drunk, but contains no express extension of the power of arrest to cases of reasonable suspicion. There this court implied that power from the nature and object of the enactment—namely, that it contemplated an immediate need of arrest G
to prevent injury to the public. That principle was enforced in *Isaacs* v. *Keech* (2), where a Divisional Court consisting of two Lords Justices felt bound by *Trebeck* v. *Croudace* (1) to apply that decision to a case of soliciting by a street prostitute. Those cases were discussed by GREENE, L.J., in *Ledwith* v. *Roberts* (3), and at p. 269 I expressed H
my entire agreement with what he had there said. Whether or not I should have decided *Trebeck* v. *Croudace* (1) in the same way is not a matter which I can discuss, but I am bound to say that it is not easy to reconcile it with *Bowditch* v. *Balchin* (4), which lays down a fundamental principle of the liberty of the subject. In my opinion, that principle

has no application whatever to the enforcement on behalf of the Commissioners of Customs of a customs fine, and consequently the decision in *Trebeck* v. *Croudace* (1) does not bind us in the present case. For the above reasons, I think that the appeal should be allowed, the judgment below discharged, and judgment entered for £25 damages for false imprisonment, with costs in both courts. The costs below I will deal with separately. A

MacKinnon, L.J. [read by Clauson, L.J.]: This is an appeal from a judgment of the judge of the Court of Passage at Liverpool. B The plaintiff was a ship's steward. The defendants were preventive officers of the Customs. On the morning of July 5, 1938, the defendants detained the plaintiff, pursuant to the powers given them by the Customs Consolidation Act, 1876, s. 186, on a charge of harbouring a box of cigars, and took him to a police station. In the afternoon, he was C released on bail. On July 6, the charge was heard by the stipendiary magistrate. At the conclusion of the evidence, the stipendiary magistrate said:

> I think there is a real doubt in this case, which the prisoner ought to get the benefit of.

D He was therefore discharged. On Dec. 15, 1938, the plaintiff issued a writ in the Court of Passage against the defendants claiming damages for (i) wrongful arrest, and (ii) malicious prosecution. The judge dismissed both claims. The plaintiff appeals. As to the claim for malicious prosecution, I think that we are all agreed that the judge E was right in holding that the plaintiff had failed to establish the absence of reasonable and probable cause for the prosecution on the part of the defendants, and his appeal on that claim fails. The judge remarks that, having heard the story again, and observed the demeanour of the plaintiff: F

> As a judge of fact I could not accept his account. I remember that he had been acquitted, and I am bound to regard him as innocent of the offence. I think, however, that the defendants had reasonable grounds for not accepting his story...

The plaintiff having been arrested and detained for some hours by G the defendants, it was for them to justify that. They relied on sect. 186 of the Act of 1876, and the question involved in this appeal concerns the construction of a few words in that section. The earlier part of it defines certain offences, and the section ends as follows:

> . . . and the offender may either be detained or proceeded against by summons.

H It is argued for the plaintiff that the word "offender" must mean one who is in fact guilty of the offence, so that, however strong and reasonable may be the grounds for suspecting a man, if he is lucky enough to get the benefit of a doubt when he is tried, and to be discharged, the officers who detained him are *ipso facto* liable to a claim for damages for wrongful arrest. I confess that I do not see why the simple word

" offender " must mean one who is in fact guilty of the offence. I think that it may equally mean " one who on reasonable grounds is suspected of the offence." The word " culprit " is at least as suggestive of guilt as the word " offender." The clerk of assize for centuries said, " Culprit, how wilt thou be tried ? " but by that word " culprit " he did not mean " You who are in fact guilty," for, on the " culprit " saying in the A time-honoured ritual " By God and my country," the clerk rejoined : " God send thee a good deliverance."

I think that, having regard to the nature of this Act and this section, the word " offender " can properly be taken to mean a suspected offender, and must not be limited to mean one who has in fact committed an B offence. If that be so, the defendants must, of course, establish that they had reasonable grounds for their suspicion. The judge has found that they had, and there was overwhelming evidence on which he could so find. Indeed, it is obvious that he shared their suspicions to the full, though he said that he had to remember that the plaintiff was acquitted, C and so he was bound to regard the plaintiff as innocent of the offence.

That the word " offender " may mean one who is suspected of the offence as well as one who has committed the offence is shown, I think, by the use of the word in other parts of this Act. I refer to sects. 197, 221, 224, 229, 233. Similarly in the Indictable Offences Act, 1848, s. 10, D powers are given as to " the offender," while by sect. 1 of the same Act the offender clearly means any person guilty, or suspected to be guilty, of having committed any such crime or offence.

Two cases were cited which, though dealing with different pieces of legislation, seem to me to be of assistance. In *Trebeck* v. *Croudace* (1), E there was a claim for false imprisonment. The plaintiff had been arrested under the Licensing Act, 1872, s. 12, which provided that :

> Every person . . . who is drunk . . . may be apprehended . . .

The plaintiff was acquitted on the charge of being drunk, and so brought F his action. The jury found that the defendant, who had arrested him, honestly believed that the plaintiff was drunk. On this, judgment was entered for the defendant. The adjective " drunk " seems to me to be less capable of ambiguity than the substantive " offender," yet it was held that the plaintiff failed. Bankes, L.J., said, at p. 167 : G

> . . . the question . . . is whether a constable who arrests a person without warrant must prove in order to justify his action that the person arrested was actually guilty of the offence, or whether it is sufficient . . . to show that he acted without malice and with reasonable and probable cause.

The court held that the latter alone was the burden upon him. H

A similar decision, on another statute, was arrived at in this court in *Isaacs* v. *Keech* (2). In the course of his judgment, Bankes, L.J., said, at p. 360 :

> I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the legislature has in mind is

> not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence.

If that be correct, as I think it is, it appears to be not merely material, but also conclusive, in the present case.

A It was suggested in argument that the authority of those two cases had been shaken or diminished by the later decision in this court of *Ledwith* v. *Roberts* (3). The actual decision in that case was that the persons arrested did not come within the description of persons whose arrest was authorised by the statute involved. That was sufficient to B decide the case, and any criticism of *Trebeck* v. *Croudace* (1) or *Isaacs* v. *Keech* (2) was irrelevant. Despite the postponement of this judgment, I have not managed to find time to read in any detail the inordinately lengthy judgments in *Ledwith* v. *Roberts* (3). I gather that the validity of the two earlier judgments was to some extent questioned or doubted, C but, as all three cases were decided in this court, I suppose that I am not constrained to agree with one view rather than the other. For my part, I think that *Trebeck* v. *Croudace* (1) and *Isaacs* v. *Keech* (2) were rightly decided, and I think that the passage from the judgment of Bankes, L.J., which I have quoted was as sound in law as it is obviously D grounded on common sense. In the result, differing unhappily from my brethren, I think that this appeal should be dismissed.

Clauson, L.J.: This is the plaintiff's appeal from the judgment of the presiding judge of the Court of Passage in favour of the defendants E in an action by the plaintiff claiming damages from the defendants, who are officers of the Commissioners of Customs, for false imprisonment and malicious prosecution. The claim in regard to malicious prosecution failed, and I need not refer to it further. In answer to the claim for false imprisonment, the defendants relied upon the power of detention conferred F on them by the Customs Consolidation Act, 1876, s. 186, in regard to a person offending against that section. It was not pleaded that the plaintiff had committed an offence under the section, and it was accordingly not contended that he had done so either before the presiding judge or in this court, but it was said that the defendants had reasonable G and probable cause for believing, and did believe, that the plaintiff had committed an offence under the section. The facts are fully stated in the judgment of the presiding judge, and I do not propose to repeat them. Counsel for the plaintiff failed to convince me that the judge's finding of fact that the defendants had reasonable and probable cause for believing, H and did believe, that the plaintiff had committed an offence under the section was other than accurate. The question remains, however, whether that finding justifies the detention by the defendants of the plaintiff in respect of an alleged offence against the section which he must be taken never in fact to have committed.

Accordingly, the sole question left in this case is whether, on the true construction of the section, the words "the offender" can be construed to cover a person of whom it cannot be predicated that he has committed an offence under the section, or, in other words, whether there is any ground for construing the words as including a person whom the detaining party believes on reasonable and probable grounds to have committed an offence under the section. As a matter of English language, I find it impossible to give the suggested larger meaning to the words. If we give them the larger meaning, in my judgment, we are going beyond the natural construction of the statute, and, in a case in which the liberty of the subject is concerned, we are not free so to do, as was pointed out by Pollock, C.B., in *Bowditch* v. *Balchin* (4), at p. 381.

However, it was strenuously contended before us by counsel for the defendants that we ought nevertheless to give the crucial words an extended meaning, by reason of the decision of this court in *Trebeck* v. *Croudace* (1), and the argument was fortified by a reference to *Isaacs* v. *Keech* (2), where a Divisional Court, referring to *Trebeck* v. *Croudace* (1), construed a power given to a constable by the Town Police Clauses Act, 1847, s. 28, to take into custody a person who within his view committed an offence under that Act as a power to take into custody a person whom the constable honestly and on reasonable grounds believed to be committing the offence. These cases have been recently considered in this court in *Ledwith* v. *Roberts* (3). The judgment of Greene, L.J., and in particular the passages appearing at pp. 256-258 of the report, make it superfluous for me to analyse those cases once again. I am prepared to accept *Trebeck* v. *Croudace* (1) as authority for the following proposition which may well be (and, indeed, must, I think, in this court be taken to be) the law—namely, that the natural construction of a section conferring a power of arrest upon an executive officer in case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable grounds that the offence has been committed, if the character of the offence is such that, in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for. If that be a correct view of the canon of construction to be applied, it seems clear that reliance cannot be placed on any principle to be derived from the decision in *Trebeck* v. *Croudace* (1), where, as in the present case, the power is given merely for the purpose of facilitating the recovery from the alleged offender of certain penalties. As I read the section, that is the sole purpose of the power of detention given by the section under consideration. It is perhaps not without interest to note that the Act contemplates that the power of detention conferred by the section, while no doubt it is exercisable promptly immediately upon the commission of the offence, may, in default of earlier exercise, be exercised at any time within 3 years. For these reasons, I am of opinion that the defence of honest belief based on reasonable and probable cause that the alleged offence had been committed does not avail to the defendants, and that, accordingly, there should be judgment for the plaintiff for damages for false imprisonment. By consent of counsel, the sum to be awarded was left to this court, and I concur in the assessment of the damages at £25.

Judgment for the appellant for £25.

Solicitors: *Silverman & Livermore* (for the appellant); *Solicitor to the Customs and Excise* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

FORSYTH *v.* THOMPSON.

[KING'S BENCH DIVISION (Lawrence, J.), **June 11, 12, 13, 1940.**]

Income Tax—Annual payments—Contracts with mutual society providing for weekly payments in event of disability—Premiums to society to continue during receipt of benefit payments—Liability of payments to tax—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case III, r.* 1.

The appellant entered into contracts of insurance with two mutual insurance societies under which he was entitled to receive certain weekly payments in the event of sickness. The contracts provided that he should not carry on his profession as a dental surgeon during the receipt of payments, and that he must continue to pay the premiums half-yearly or yearly, in the one case, and monthly in the other, during the receipt of payments under the contracts, and upon failure to make these payments, all benefit under the insurance was to cease. In 1931, he was permanently disabled by accident and was unable to carry on his profession, and from that date he received weekly sums of money under the two policies. He was assessed to tax in respect of those sums on the ground that they were annual payments within the meaning of the Income Tax Act, 1918, Sched. D, Case III, r. 1:—

HELD: (i) the sums, though payable by a mutual society to a member of the society under an individual contract with the society, were to be considered on the same basis as similar sums payable under a similar contract with a proprietary company, and were taxable as annual payments or annuities.

(ii) the arrangement whereby the benefit of the insurance was contingent on the payment of the premiums either yearly or half-yearly in the one case and monthly in the other did not prevent the sums which he received from being annual payments within Sched. D, Case III, r. 1.

[**EDITORIAL NOTE.** A mutual insurance society in general undertakes to return to its members that total sum collected from them, together with such interest as it may have earned. From this consideration it was argued that annual sums paid to a member by such a society are not income, as they would be in the case of an ordinary insurance company, but are in the nature of capital. It is decided, however, that, in the circumstances of the present case, such payments are income, and liable to tax.

AS TO ANNUAL PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380; and FOR CASES, see DIGEST, Vol. 28, pp. 66-67, Nos. 340-350.]

Cases referred to:

(1) *New York Life Insurance Co.* v. *Styles* (1889), 14 App. Cas. 381; 28 Digest 59, *300*; 59 L.J.Q.B. 291; 61 L.T. 201; 2 Tax Cas. 460.

(2) *Gliksten (J.) & Son, Ltd.* v. *Green*, [1929] A.C. 381; Digest Supp.; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; *affg.*, [1928] 2 K.B. 193.

(3) *Thomas* v. *Evans (Richard) & Co., Jones* v. *South-West Lancashire Coal Owners' Assocn.*, [1927] 1 K.B. 33; Digest Supp.; 95 L.J.K.B. 990; 135 L.T. 673; 11 Tax Cas. 790; *affd. sub nom. Jones* v. *South-West Lancashire Coal Owners' Assocn.*, [1927] A.C. 827; 96 L.J.K.B. 894; 137 L.T. 737.

(4) *R.* v. *British Columbia Fir & Cedar Lumber Co., Ltd.*, [1932] A.C. 441; Digest Supp.; 101 L.J.P.C. 113; 147 L.T. 1. A

(5) *Moss' Empires, Ltd.* v. *Inland Revenue Comrs.*, [1937] A.C. 785; [1937] 3 All E.R. 381; Digest Supp.; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264.

(6) *Renfrew Town Council* v. *Inland Revenue Comrs.*, [1934] S.C. 468; Digest Supp.; 19 Tax Cas. 13.

B

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

F. Heyworth Talbot for the appellant, the taxpayer. C

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the respondent, the inspector of taxes.

LAWRENCE, J.: This is an appeal by Leonard W. Forsyth, a dental surgeon, who was insured with two mutual insurance societies—namely, the Medical Sickness, Annuity and Life Assurance Society and the D Dentists' Provident Society. Under the contracts which he made with those two societies, he was entitled to receive certain weekly payments in the event of sickness. In 1931, he suffered a serious accident, which permanently disabled him, so that he was not able to carry on his profession, and from that date he has received weekly sums of money E under these two insurance policies or contracts which he had with these two societies. He has been assessed under the Income Tax Act, 1918, s. 125 (1), for the years from Apr. 5, 1933, to Apr. 5, 1938, inclusive in respect of those sums. As I understand, however, the Revenue have not insisted upon the payment in respect of past years, and are seeking F to tax him in respect of one year only. The commissioners have held that he is liable to taxation in respect of those sums, on the ground that they were annual payments within the meaning of the Income Tax Act, 1918, Sched. D, Case III, r. 1, and this appeal is brought from that decision. G

Under the contracts which the appellant made with the Medical Society, he was entitled, if he wished, to make one payment and to obtain the benefits to which he would be entitled by that one payment, or, in the alternative, he had the option to make either annual or half-yearly payments. He took the latter course, and made either annual H or half-yearly payments to the Medical Society. In the case of the Dentists' Provident Society, he had no such option. He had to pay the premiums monthly. The contracts provided that the benefits thereunder were to be payable to him up to the age of 65 years, that he should not carry on his profession as a dental surgeon during the receipt of payments, and that he must continue to pay the premiums half-yearly or yearly, in the one case, and monthly in the other, during the receipt of payments under the contracts.

In these circumstances, it was argued on behalf of the appellant that, in the first place, these were not annual payments within the meaning of Case III, because the annual premiums alone secured the compensation for the year for which they were paid, that, by the terms of the contracts, he was entitled only to be re-insured by a fresh payment at the beginning of the next year. Secondly, it was said that it was not an annual payment because it might never occur, or it might never recur, that in a sense it depended upon the contingency of his becoming ill, and that it was exactly analogous to an accident policy, which, it was said, would not be an annual payment taxable under the Income Tax Acts. Thirdly, it was said that it was not an annual payment because it was not all profit in the hands of the recipient, in so far as he had to pay for it in that very year. Lastly, it was said that, these being mutual societies, on the authority of *New York Life Insurance Co.* v. *Styles* (1), there was no element of profit or gain in the matter. It was simply a right which, in certain circumstances, the appellant had, under his contract with the mutual society of which he was a member, to get back his own money, and it was said that, on the principle of *New York Life Insurance Co.* v. *Styles* (1), since the surplus of such a society was not taxable, similarly sums of money paid to members of the society under their individual contracts with the society were not taxable.

On behalf of the Crown, it was argued, with reference to the question of mutuality, that the sums paid to members of a mutual society under their individual contracts, which might be contracts for annuities, stand upon a footing entirely different from that of the surplus which was dealt with in *New York Life Insurance Co.* v. *Styles* (1), and it was insisted that a member who has entered into an annuity contract with a mutual society is getting very much more than his own money, and that there is a profit element in it. In that connection, *Gliksten (J.) & Son, Ltd.* v. *Green* (2) was relied upon, and also *Thomas* v. *Evans (Richard) & Co.* (3), in which it was held that the payment of premiums by a member of a mutual society was deductible. It was also pointed out that it would be a very remarkable thing if there were no element of profit in the case of an annuity purchased by a member from a mutual society, although there would be an element of profit if an annuity were purchased from a proprietary company, having regard to the fact that, on ordinary business principles, the member of the mutual society would in fact obtain a greater profit under his annuity than would a person who took out an annuity with a proprietary company.

It was also argued that sick pay such as is in question in this case is really in substitution for the professional income of the member of the society, as is shown by the fact that a professional man is not entitled to carry on his profession while he is in receipt of sick pay. In that connection, reliance was placed upon *R.* v. *British Columbia Fir & Cedar Lumber Co., Ltd.* (4).

On the question of whether or not the payment had the necessary element of recurrence, reliance was placed upon *Moss' Empires, Ltd.* v. *Inland Revenue Comrs.* (5), and in particular upon the observations A
of LORD MACMILLAN, at p. 793 ([1937] 3 All E.R., at p. 385):

> At your Lordships' bar it was argued for the appellants that the payments were not annual payments inasmuch as they were casual, independent, not necessarily recurrent, and throughout subject to a contingency. This argument commended itself to LORD MONCRIEFF, but I am unable to accept it. There was a continuing obligation extending over each and all of the five years to make a payment to the B
> trustees for the shareholders in the event of the company earning no profits or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments.

Thus, it was argued here that the fact that the payments were contingent upon sickness did not prevent their being annual payments. On the other hand, on behalf of the appellant, this case was C
distinguished on the ground that here there was no continuing obligation beyond the year. Really, the main argument on behalf of the appellant is that the contract is to be looked at as a contract for one year, and that it therefore ceases to be an annual payment by the insurance company. It is said that, whereas in *Moss' Empires, Ltd.* v. *Inland Revenue Comrs.* (5) D
there was a continuing obligation, yet in this case there was none, because, directly the appellant ceased to pay, the obligation of the mutual societies ceased. However, the Attorney-General's answer to that argument was that this was merely a term of the contract, that the payment for what was in reality an annuity was to be extended over the period of the E
appellant's life up to 65 years of age, that it did not cease to be an annuity because the terms of the contract provided that, instead of one single sum being paid for it, a series of sums was to be paid, and that, in the event of their not being paid, the annuity would cease. In that connection, he drew attention to the words of the rule applicable to Case III— F
namely, that the tax shall extend to an annual payment whether such payment is payable "as a personal debt or obligation by virtue of any contract." If it is an annual payment, he contended that the fact that the contract had this term did not prevent it from being an annual payment.

In considering the question of an accident policy, the Attorney-General G
also referred to *Renfrew Town Council* v. *Inland Revenue Comrs.* (6), and to the observations of LORD CLYDE, at pp. 18, 19. In commenting upon those observations, the Attorney-General submitted that the real question was what the payment made was. If it were a lump sum payable under an accident policy, it would probably fall to be considered as a H
capital receipt. If, on the other hand, under the terms of the policy, he was entitled, in the event of accident, to receive payments over a period of time, those payments might at any rate have the character of annual payments within Case III. As the Attorney-General said, a man might purchase any variety of articles. On the other hand, he

might purchase an annuity, and, if he did so, although, of course, he would not be taxable in respect of goods which he purchased, yet he would be taxable in respect of the annuity. He might take out an insurance, and, if that insurance were in the course of his trade, and were an insurance of his stock-in-trade as in *Gliksten (J.) & Son, Ltd.* v. *Green* (2) A and in *R.* v. *British Columbia Fir & Cedar Lumber Co., Ltd.* (4), he would be taxable in respect of the proceeds of that insurance, although he would not be taxable in respect of the proceeds of an insurance of some capital asset, and, therefore, whether or not he is taxable depends upon what he gets.

B Counsel for the appellant distinguished *Thomas* v. *Evans (Richard) & Co.* (3), on the ground that that was a case of a trade. He said that that entirely differentiated the matter, and, although it was right in the case of a trade to deduct premiums paid to a mutual insurance society and to credit, in the computation for that trade, sums received from a C mutual society, yet that did not apply to cases of non-traders, and, in the case of non-traders, the decision in *New York Life Insurance Co.* v. *Styles* (1) that the surplus was not taxable was applicable to the contracts which members of a mutual insurance company make with the company for annuities or for any other payments to them, and that those payments D had no element of profit in them. In his reply, he again insisted upon his argument that it was not an annuity in this case because the payment to the appellant depended upon his payment of a premium or premiums in the year in which he fell sick or was entitled to sick pay.

In my opinion, it is impossible to draw the distinction which is sought E to be drawn on behalf of the appellant, on the ground that these were mutual societies, In my opinion, the sums payable by a mutual society to its members under their individual contracts with the mutual society are to be considered on the same basis as are similar contracts with a proprietary company. If they result in annual payments or payments F of annuities, the recipients are taxable in respect of those annual payments or annuities. Nor is there anything, in my opinion, in the argument advanced on behalf of the appellant that these contracts are to be looked at as contracts which determine at the end of each year. In my opinion, the true view is that the payment for these annual sums is G merely deferred. It is merely a term of the contract which the appellant has entered into that he should continue to pay either annually or half-yearly, or monthly in the other case, and that, if he does not pay, he ceases to have any right under the contract. In my opinion, that does not prevent the sums which he receives from being annual payments within H Case III. In these circumstances, I am of opinion that the finding of the commissioners was right.

Appeal dismissed. No order as to costs.

Solicitors: *Hempsons* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re VRINT, VRINT *v.* SWAIN.

[CHANCERY DIVISION (Bennett, J.), **July 11, 12, 1940.**]

Wills—Family provision—Estate of small capital value—Application of Act—Intention of testator—Admissibility of evidence—Inheritance (Family Provision) Act, 1938 (c. 45), *s.* 1.

The testator left his entire estate, the net value of which was £138 14*s.* 10*d.*, absolutely to the defendant, who was not a dependant within the meaning of the Inheritance (Family Provision) Act, 1938. The testator's widow, the plaintiff, applied to the court under sect. 1 of the Act for an order that reasonable provision should be made for her maintenance. The testator married the plaintiff in 1914, and it was established that the marriage had been an unhappy one, and that the testator deserted the plaintiff in Aug., 1935, after which date no further communication had passed between the testator and the plaintiff. In support of the testator's reasons for making the dispositions in his will, the defendant tendered in evidence a proof of evidence to be given by the testator in police-court proceedings for maintenance. This proof was taken by a solicitor and was not signed by the testator. It was contended that this proof was admissible as "evidence" within the meaning of sect. 1 (7) of the Act, although not legal evidence within the ordinary meaning of the term :—

HELD : (i) the document was admissible within sect. 1 (7) as material at which the court was entitled to look to discover the testator's reasons for making the dispositions made in his will.

(ii) owing to the smallness of the estate, no reasonable provision for maintenance was possible, and the plaintiff could not, therefore, bring herself within the operation of the Act. It was not the intention of the Act to provide legacies for dependants.

[**EDITORIAL NOTE.** The object of the Inheritance (Family Provision) Act, 1938, is to provide maintenance for the surviving spouse or children of the marriage. Maintenance is, of course, provided by the payment of some part of the income of the estate. The Act, therefore, does not in the ordinary way envisage any capital payment, but provision is made for a capital payment where the estate does not exceed £2,000. Where the estate is very small, as in the present case, any capital payment which could reasonably be made would be so small in amount as to be useless to the applicant. The decision also includes a holding which should prove very useful in the practical working of the Act. Nothing is more difficult than to prove the intention of a testator, and the construction of the Act which allows material to be considered although it would not be admissible as evidence in law will be found very helpful and a real aid to doing justice between the parties.

AS TO THE INHERITANCE (FAMILY PROVISION) ACT, 1938, see HALSBURY, Hailsham Edn., Supp., Wills, para. 1029. FOR THE INHERITANCE (FAMILY PROVISION) ACT, 1938, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 31, p. 149 *et seq.*]

Case referred to :

(1) *Bosch* v. *Perpetual Trustee Co., Ltd.*, [1938] A.C. 463 ; [1938] 2 All E.R. 14 ; Digest Supp. ; 107 L.J.P.C. 53 ; 158 L.T. 395.

ADJOURNED SUMMONS for an order that, pursuant to the Inheritance (Family Provision) Act, 1938, s. 1, reasonable provision be made for the maintenance of the plaintiff out of the net estate of the testator. The preliminary question whether certain evidence tendered on behalf of the defendant, not ordinarily admissible as "legal evidence," was

" evidence " within the meaning of the Inheritance (Family Provision) Act, 1938, s. 1 (7) was heard first.

Morgan Blake for the plaintiff.

P. B. Morle for the defendant.

Morle : The evidence is not evidence within the Evidence Act, A 1938, s. 1, but the legislature intended that, in proceedings under the Inheritance (Family Provision) Act, 1938, the court could have other materials before it to discover the reasons of a testator for making the dispositions made in his will. That is the purport of subsect. (7). The provision in the subsection that the court may accept any statement B in writing signed by the testator is only an example of the kind of material which the court can accept, but there is nothing in the Act to confine " evidence " within the meaning of the subsection to such a document, such question being left to the discretion of the court.

Morgan Blake : This document is not " evidence " within the meaning C of the Evidence Act, 1938, s. 1, nor of the Inheritance (Family Provision) Act, 1938, s. 1 (7). It was not, therefore, admissible under the latter subsection, in which the legislature had specifically indicated the type of document which should be admitted—namely, a statement in writing signed by the deceased and dated—and evidence admitted D under that subsection should be confined to such documents.

BENNETT, J. : The application before the court is under the Inheritance (Family Provision) Act, 1938, s. 1. Where a man dies domiciled in England, leaving a widow and having made a will, if the E court is of the opinion that the will does not make reasonable provision for the maintenance of the widow, then the Act enables the court to make an order that such reasonable provision as the court thinks fit shall be made out of the testator's net estate for her maintenance. Sect. 1 (7) provides as follows :

> F The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any G inference can reasonably be drawn as to the accuracy or otherwise of the statement.

In this case, in 1935 the plaintiff brought proceedings for maintenance against the testator in the police court, and on Sept. 10, 1935, an order was made in those proceedings. The will by which the testator disposed of his estate was made by him on Sept. 27, 1935, several days after H the order. On behalf of the executor, for the purpose of enabling the court to ascertain the testator's reason for making the will, counsel for the defendant tenders in evidence a proof of the evidence that the testator was supposed to give in the police-court proceedings. Although it was not strictly proved, it is conceded that these matters can be proved. It was prepared by the testator's solicitor in the ordinary course of business, and was dictated by the solicitor to a typist, who transcribed it. It is admitted that the document produced was sent by the solicitor to the testator and returned to the solicitor without any comment upon it, and there was no covering letter or document signed by the testator when he returned the proof to his solicitor. The question is whether the court is entitled to look at that document for the purpose of ascertaining the testator's reasons for making the disposition he did make in his will. This evidence is objected to on behalf of the plaintiff on two grounds. The first ground is that it is not legal evidence. That objection is well-founded. It is not admissible as evidence under the common law nor under the Evidence Act. The question really turns upon what is meant by the word "evidence" in the Inheritance (Family Provision) Act, 1938, s. 1 (7). Does that word mean legal evidence, or does it mean any evidence such as persons acting outside a court of law are accustomed to consider and take into consideration in determining such questions? In my judgment, the word "evidence" is not confined to evidence which is admissible in a court of law. If it were confined to legal evidence, there would be no necessity to have the subsection in the Act at all. I propose to admit the document, for it is a document to which the subsection applies and at which the court is entitled to look. We have to ascertain, if we can, the testator's reasons for making these dispositions.

His Lordship then considered the principal point of the case.

Morgan Blake: The introduction of such a fictitious person as a reasonable testator, which might lead to the defeat of the intentions of the Act, should not be permitted. The question is whether the widow so conducted herself as to make it proper for the testator to disinherit her. This is the test which Parliament lays down in sect. 1 (6). If she is not a beneficiary, or if she is entitled to a disproportionately small share under her husband's will, she is *prima facie* entitled to come to the court for relief. The defendant has put his case upon the proof, which is not legal evidence, of a hysterical man who has left his wife and is about to have proceedings taken against him in the police court. Moreover, the police-court proceedings resulted in an adjudication in favour of the plaïntiff.

Morle: It is not unreasonable of the executor to oppose this application on the material before the court. From the date of the desertion in 1935 until the testator's death, there was no communication between the testator and the widow. The question was whether this Act is intended to apply to an estate of this kind. The intention of the Act is not to give legacies out of an estate, but maintenance. There is nothing in the Act which gives the plaintiff a vested right to maintenance. Maintenance cannot possibly be given out of this estate, and, therefore, it is not within the Act. This was already an unhappy marriage in 1915, long before the defendant met the testator, on the evidence put before the court. In *Bosch* v. *Perpetual Trustee Co., Ltd.* (1), it was held that, in considering what is proper maintenance, the court must have regard to the extent of the property left by the testator, and to all the existing facts and surrounding circumstances.

Morgan Blake, in reply.

A BENNETT, J.: The summons which I have before me is a summons
in which Mrs. Vrint, the widow, is the plaintiff, and Swain, the sole
executor of the will, is the defendant. The summons is issued in the
matter of the estate of Albert Edward Vrint and the Inheritance (Family
Provision) Act, 1938, and the relief asked is that, pursuant to sect. 1
B of that Act, the court may order reasonable provision for the maintenance
of the plaintiff out of the net estate of the testator. The testator died
on Nov. 9, 1939, leaving a will by which he gave all his property to the
defendant, Clifford Eric Swain, upon trust:

> . . . first to pay my just debts and funeral and testamentary expenses and
> C thereafter upon trust for the said Clifford Eric Swain absolutely . . .

Then he appointed the defendant his sole executor. The will was made
on Sept. 27, 1935, and was proved by the defendant on Jan. 2, 1940.
The gross value of the testator's estate was £194 5*s*. 8*d*., and that sum
was made up of money in the Post Office savings bank, a sum due to
D him from a pension fund of the company where he worked, a sum which
he received as funeral benefit, a sick fund, and a sum of £24 18*s*. which
he received on a policy of insurance. He left a few debts, and debts,
estate duty and costs in respect of the winding up of the estate amount
to £55 10*s*. 10*d*., leaving a net estate of £134 14*s*. 10*d*. It is out of that
E sum that the plaintiff asks that reasonable provision should be made
for her maintenance. The undisputed facts are that the plaintiff was
married to the testator on Aug. 15, 1914. She was then a widow, with
one son about 13 years of age. She had one son, born on Nov. 26, 1915,
by the testator, who was then, and still was when he died, employed
F by Debenhams Limited, his weekly wages being about £2 17*s*. or
£2 18*s*. According to the plaintiff's own statement, shortly after the
birth of her son, she was neglected by the testator, who spent most of
his time away from home. He was apparently a Sunday school teacher,
and interested in the Boys' Brigade, and, according to the plaintiff's
G statement, shortly after the birth of his son he seems to have neglected
the plaintiff and to have attended to the Boys' Brigade. In 1922,
police-court proceedings for assault were taken by the widow, the
plaintiff, against the testator, those proceedings culminating in both
parties being bound over. There is the material, which I have
H admitted as evidence, which shows that in July, 1935, the testator
desired to be separated from his wife, and proposed to his solicitors
that a separation deed should be prepared, under which he would have
made an allowance of 15*s*. per week. The suggestion appears from the
letter to have emanated from the testator. After that suggestion, the
plaintiff took proceedings against the testator in the police court for

desertion, and on Sept. 10, 1935, upon the footing of desertion, the plaintiff obtained an order against the testator whereby he had to pay her the sum of 17*s.* per week. On Aug. 24, 1935, the testator left the house in which he was living with his wife, and from then until the time of his death there were no communications passing from the testator to the plaintiff. The plaintiff's son by her first marriage and the plaintiff's son by the testator are both living. The testator made the acquaintance of the defendant in 1929. He was in the Boys' Brigade in which the testator was interested, and I do not think that the facts relating to that association need be repeated. According to the plaintiff's statement and to other material at which I have looked, and which I have admitted under the Inheritance (Family Provision) Act, 1938, s. 1 (7), consisting of a proof of evidence of the testator prepared to be given in the police-court proceedings in 1935, of a letter which the testator wrote to the plaintiff's stepson on Feb. 5, 1935, and of a statement made by the testator some time after the police-court proceedings in 1922, the testator desired to make it appear that the relationship between himself and his wife had been extremely unhappy, not through his fault, but through hers. Allegations which the testator made against the plaintiff in those statements and in the letter have been denied on oath by the plaintiff, and, in those circumstances, I am not prepared to accept as true all the allegations which the testator made. Nevertheless, the fact does stand out that many years before the testator died the relationship was an unhappy one. These are all the facts which have to be considered before approaching the construction of the Act of 1938.

The Inheritance (Family Provision) Act, 1938, s. 1 (1), provides as follows:

> Where, after the commencement of this Act, a person dies domiciled in England leaving (*a*) a wife or husband . . . and leaving a will, then, if the court on application by or on behalf of any such wife . . . (in this Act referred to as a "dependant" of the testator) is of opinion that the will does not make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the testator's net estate for the maintenance of that dependant . . .

It appears from that subsection that the intention of the Act was that maintenance was to be provided for a widow out of the net estate of a testator who by his will had not made reasonable provision for her maintenance. Sect. 1 (2) provides as follows:

> The provision for maintenance to be made by an order shall, subject to the provisions of subsect. (4) of this section, be by way of periodical payments of income, and the order shall provide for their termination not later than (*a*) in the case of a wife or husband, her or his re-marriage . . .

Sect. 1 (3) provides as follows:

> The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say . . . (*b*) if the testator does not

leave a wife or husband, or leaves a wife or husband and no other dependant, one-half.

Sect. 1 (4) provides as follows:

> Where the value of a testator's net estate does not exceed £2,000, the court shall have power to make an order providing for maintenance, in whole or in part, by way of a payment of capital, so however that the court, in determining the A amount of the provision, shall give effect to the principle of the last preceding subsection.

That is to say, as the only dependant capable of obtaining a benefit under the Act is the widow, the amount for which maintenance can be provided is limited to half the capital. Subsects. (6) and (7) provide B as follows:

> (6) The court shall, on any application made under this Act, have regard to any past, present or future capital or income from any source of the dependant of the testator to whom the application relates, to the conduct of that dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise.
>
> C (7) The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any D inference can reasonably be drawn as to the accuracy or otherwise of the statement.

The only source of income which the plaintiff has at the present time is the widow's pension of 10*s*. per week. She is 58 years of age, and in two years' time she will be entitled to an old age pension in place of that. That is her only source of income. She has, I suppose, a right E to be assisted by the Public Assistance Committee, in which case, I understand, her two sons could be called upon to help provide for their mother's maintenance.

I propose to decide the case on this ground. The Act is *prima facie* an Act to provide out of the net estate of a testator reasonable provision F for the maintenance of a dependant. The amount available where the testator leaves a widow and no other dependant is half the income, or, as in this case, where the net estate does not exceed £2,000, half the capital. It is not an Act for the purpose of obtaining legacies out of the testator's estate. The net estate of this testator is £138 14*s*. 10*d*. Out of half G of that sum I do not think it is reasonable to make an application to this court for maintenance, particularly in a case where, unless the defendant executor has done something to disentitle him to receive his costs out of the estate, they would have to come out of the estate. I can see no proper ground in this case upon which I can deprive the H defendant of his costs out of the estate. In my judgment, this application ought not to have been brought. I propose to dismiss it with costs.

Application dismissed with costs.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the plaintiff); *Boyce, Evans & Sheppard* (for the defendant).

[*Reported by* I. G. R. MOSES, *Barrister-at-Law.*]

Re ROYAL BANK OF SCOTLAND.

[Chancery Division (Bennett, J.), **July 9, 1940.**]

Emergency Legislation—Mortgage—Notice requiring payment of mortgage moneys—Application by mortgagees to exercise power of sale—Application made before expiration of 3 months from service of notice—Law of Property Act, 1925 (*c.* 20), *s.* 103—*Courts* (*Emergency Powers*) *Act,* 1939 (*c.* 67), A
s. 1.

By an equitable charge, dated June 15, 1936, the respondent charged two properties in favour of the applicants. On May 15, 1940, the applicants gave notice to the respondent calling in all moneys due under the charge. Subsequently, on May 28, 1940, a summons was issued asking that on Aug. 15, the date of the expiration of the notice, they B
might proceed to the exercise of all remedies available to them, including those of possession and sale. When the summons came before the master on July 2, the respondent objected to it, on the ground that the application was premature, as the remedies asked for were not enforceable until Aug. 15:—

Held: the application was premature, and the summons was sent back to chambers, with the direction that it was not to be restored until C
after Aug. 15.

[**EDITORIAL NOTE.** An applicant under the emergency legislation has to show that he cannot comply with the order or proposed order of the court by reason of circumstances directly or indirectly attributable to the war. This question cannot properly be decided until the time comes for the court to make the order, and, D
therefore, the application in this case was premature.

As to Emergency Powers, see HALSBURY, Hailsham Edn., Vol. 23, pp. 464, 465, para. 683; and for Cases, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Case referred to:

(1) *Re Huddersfield Building Society* (*Alton*), [1940] 3 All E.R. 218; Digest Supp. E

Procedure Summons by the Royal Bank of Scotland asking that they may proceed on Aug. 15, 1940, the date on which notice calling in all moneys due to them under an equitable charge expires, to exercise all powers or remedies which may be available to them, and in particular F
to enter into possession of, and to sell, the property charged. The respondent, Ezekiel Elia Shahmoon, executed an equitable charge in favour of the Royal Bank of Scotland on June 15, 1936, on his properties Trosley Towers and Bakers' Farm, Wrotham, Kent. By the charge the mortgagee was given all powers conferred on mortgagees by the G
Law of Property Act, 1925. On May 15, 1940, the bank gave notice to the respondent calling in all moneys due to the bank on his account. A summons under the Courts (Emergency Powers) Act, 1939, was issued on May 28, 1940, and came before the master on June 20, but the respondent's solicitors asked for an adjournment for the purpose of filing H
evidence. No evidence was filed, and the matter came before the master on July 2. The respondent's solicitors took the view that the bank's application was premature, and should not have been brought before the expiration of a period of 3 months from the date of the notice, in that the Courts (Emergency Powers) Act, 1939, s. 1 (2), refers to "any remedy

which is available," and the remedy was not available to the bank until the expiration of a period of 3 months from the date of calling in pursuant to the Law of Property Act, 1925, s. 103. The master made an order that, subject to the production of the original deed, he would make an order for possession and realisation, but, at the request of the respondent's
A solicitors, he adjourned the summons into court as a procedure summons.

D. Markwick for the applicants.

J. Pennycuick for the respondent.

BENNETT, J.: It is clear, on looking at the charge, that the mort-
B gagees will not be in a position to realise the security until Aug. 15, 1940. The material date at which the court has to consider whether or not a mortgagor is in a position to perform his obligations is that at which the person entitled to exercise some remedy against the mortgagor is in a position to do so. By Aug. 15, the mortgagor's position may be com-
C pletely changed, and such change may be due to circumstances arising directly out of the war. If I accede to this application and give the mortgagees leave to exercise a remedy which does not become exercisable till Aug. 15, I may be depriving the respondent of his remedies under the Courts (Emergency Powers) Act, 1939, s. 1 (4). This application is
D premature. Therefore, I propose to adjourn the summons back to chambers, with the direction that it is not to be restored until after Aug. 15. The applicants are to pay the costs of the adjournment.

Solicitors: *Forsyte, Kerman & Phillips* (for the applicants); *Piesse & Sons* (for the respondent).

E

[*Reported by* I. G. R. MOSES, *Barrister-at-Law.*]

BARKING BOROUGH RATING AUTHORITY *v.* CENTRAL ELECTRICITY BOARD.

F

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **June 26, 27, 28, July 5, 1940.**]

Rates and Rating—Basis of assessment—Electricity undertaking—Limiting profits basis to accounts for year preceding date of assessment—Whether "special circumstances" rendering profits basis inapplicable—Rating and
G *Valuation Act,* 1925 (*c.* 90), *s.* 31 (5).

The hereditament occupied by the respondents in the area of the appellants, consisting of pilot wires of an electricity substation or transformer station and certain transmission towers and lines, was assessed in the appellants' valuation list at a rateable value of £1,244, and on May 26, 1934, the respondents by a proposal objected to the
H assessment on the ground that it was excessive and unfair. On Jan. 18, 1935, the appellants made a proposal to amend the list by increasing the assessment to £8,436, and the respondents duly objected thereto. The proposals and the objection were heard by the local assessment committee on Oct. 19, 1936, and Mar. 15, 1937, when they decided to amend the list by increasing the assessment to £2,100, which increase was affirmed on appeal to quarter sessions by the appellants, who then appealed against the decision of quarter sessions. At the hearing

before quarter sessions, evidence relating to the estimates and the accounts of the respondents subsequent to 1934 was excluded as irrelevant. The appellants contended that there was no justification in law for limiting the profits basis to the accounts for the year preceding the date of the assessment, and that there were " special circumstances " existing at Apr. 1, 1934, which in law made the profits basis inapplicable, or required it to be modified. The respondents contended that the statutory hypothetical tenant from year to year was not a tenant for a term certain, and in particular not a tenant for a term of 10 years, that the evidence was thus rightly excluded as irrelevant, and that there were no special circumstances rendering the profits basis inapplicable :— A

HELD : (i) there were no special circumstances which rendered the profits basis inapplicable. B

(ii) evidence relating to the accounts subsequent to 1934 was rightly excluded as irrelevant.

(iii) as the estimates subsequent to 1934 were private documents of the respondents, they could not be forced to produce them and to put them in evidence.

Decision of the Divisional Court (LORD HEWART, L.C.J., HUMPHREYS and HILBERY, JJ. [1940] 2 All E.R. 341) *affirmed.* C

[**EDITORIAL NOTE.** The rateable value is usually based upon the rent, but, in the case of public utility undertakings, the actual profits made upon the property to be valued have long been taken as a basis upon which to calculate the rateable value. The present case is mainly concerned with the period over which the inquiry concerning profits shall extend and the extent to which the assessment authority can call for the production of estimates of the profits of the undertaking. D The property to be assessed in the present case presented a peculiar difficulty in that a large part of the receipts of the undertaking arose from the sale of electricity to other undertakers, who had generated it.

AS TO ASSESSMENT ON PROFITS BASIS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 390, 391, para. 824 ; and FOR CASES, see DIGEST, Vol. 38, pp. 480-493, Nos. 386-484.] E

Cases referred to :

(1) *Kingston Union* v. *Metropolitan Water Board,* [1926] A.C. 331 ; 38 Digest 547, *901* ; 95 L.J.K.B. 605 ; 134 L.T. 483 ; *affg.* S.C. *sub nom. Metropolitan Water Board* v. *Kingston Union Assessment Committee,* [1925] 2 K.B. 509.

(2) *R.* v. *Mile End Old Town* (*Churchwardens & Overseers*) (1847), 10 Q.B. 208 ; F 38 Digest 552, *925* ; 16 L.J.M.C. 184 ; 9 L.T.O.S. 312.

(3) *R.* v. *West Middlesex Waterworks* (1859), 1 E. & E. 716 ; 38 Digest 548, *908* ; 28 L.J.M.C. 135 ; 32 L.T.O.S. 388.

(4) *Railway Assessment Authority* v. *Southern Ry. Co., London County Council* v. *Southern Ry. Co.,* [1936] A.C. 266 ; [1936] 1 All E.R. 26 ; Digest Supp. ; 105 L.J.K.B. 115 ; 154 L.T. 314 ; *affg.* S.C. *sub nom. Re Southern Ry. Co. Appeals* (1935), 152 L.T. 299. G

(5) *Consett Iron Co., Ltd.* v. *Durham County Assessment Committee for No. 5 or North-Western Area,* [1931] A.C. 396 ; Digest Supp. ; 100 L.J.K.B. 242 ; 144 L.T. 649.

(6) *Port of London Authority* v. *Orsett Union Assessment Committee,* [1920] A.C. 273 ; 38 Digest 563, *1017* ; 89 L.J.K.B. 481 ; 122 L.T. 722. H

(7) *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee,* [1934] A.C. 33 ; Digest Supp. ; 103 L.J.K.B. 9 ; 150 L.T. 123.

(8) *R.* v. *London, Brighton & South Coast Ry. Co.* (1851), 15 Q.B. 313 ; 38 Digest 518, *695* ; 20 L.J.M.C. 124 ; 16 L.T.O.S. 533.

APPEAL by the rating authority from a judgment of the Divisional Court (LORD HEWART, L.C.J., HUMPHREYS and HILBERY, JJ.), dated

Apr. 2, 1940, and reported [1940] 2 All E.R. 341, where the special case, so far as material, is set out.

Sydney G. Turner, K.C., and *J. Scott Henderson* for the appellants.

W. Craig Henderson, K.C., and *C. Erskine Simes* for the respondents.

Turner, K.C.: The undertaking of the respondents is of a special
A character. The undertaking is not analogous to any gas, water, or other
undertaking. On the authority of *Kingston Union* v. *Metropolitan*
Water Board (1), it is said by the respondents that quarter sessions could
look at the accounts for 1933 only. Quarter sessions are entitled to
look at any accounts or at any documents which may be in existence
B at the time of the hearing of the appeal by them, if those accounts or
documents throw any light upon the question as to the value of the
hereditament at the time when the rate was made. If an undertaking
has accounts for an earlier period, it is permissible to look at those accounts.
One is free to depart from the profits basis when it is necessary to do so
C in order to solve the problem. The present case is not within the
principle of *Kingston Union* v. *Metropolitan Water Board* (1) at all. In the
present case, it is necessary to depart from the formula there laid down
in order to get an answer to the question put by the Rating and Valuation
Act, 1925. There was no evidence before quarter sessions on which they
D could properly come to the conclusion that there were no special
circumstances. They must have regarded themselves as bound by *Kingston*
Union v. *Metropolitan Water Board* (1) to apply the profits basis in the
present case. If I am wrong on that, then there are special
circumstances in the present case which bring it within the *dictum* of VISCOUNT
E CAVE, L.C., in the *Kingston* case (1). By limiting themselves to the
profits basis, quarter sessions have left out of consideration something
which they ought to have taken into consideration—namely, the
contractor's test. The accounts for 1933 did not relate to the hereditament in
question. In the Electricity (Supply) Act, 1926, the matters are dealt
F with area by area and scheme by scheme, and each area should be
regarded separately. In such a case as the present, where there are other
areas, the application of the profits basis would involve taking into
consideration the profits made in a wholly different area. It necessarily
follows that quarter sessions were determining this matter as one of law.
G They had before them the fact that the sum of £455 was being paid by the
respondents for wayleaves. Ground rent was also being paid. The
transformer station cost £164,000 to build. They could not have ignored
all these relevant circumstances unless they had considered themselves
bound to apply the profits basis. In 1933, two acres only were in
H operation, and the south-east area was neither of them. The actual
value of the occupation to an occupier of the hereditament in question
is to be measured by the rent which the hypothetical tenant would pay.
At quarter sessions, the accountant for the respondents was asked to
produce the estimates for the period of 10 years. Objection was taken
on the ground that the estimates were irrelevant, unless the court took

the view that it could look forward and was not bound by the accounts for 1933. The court decided that the only estimates which could be asked for were the estimates for 1934-35, if they were in existence at the time when the rate was fixed. This is not a question of the documents being privileged. It is a question of the absence of machinery to compel production of the documents. [Counsel referred to *Consett* A *Iron Co., Ltd.* v. *Durham County Assessment Committee for No. 5 or North Western Area* (5).]

Scott Henderson followed on the same side.

Henderson, K.C.: The respondent board was created for the purpose of reducing the cost of generating electricity. It does this by buying B output and by selling it partly to the producers and partly to others. The board has no power to compel any authorised undertaking to take its supply from the board. It is quite wrong to say that the board can compel customers by closing down stations. Sect. 10 of the Act of 1926 places upon the board an obligation to supply any authorised under- C taker requiring a supply. The board has to frame a tariff and make estimates in the hope that, after a period of 10 years, the accounts will balance. The basis of the decision in *Kingston Union* v. *Metropolitan Water Board* (1) is that no one can reasonably be expected to become a tenant of a public utility undertaking without regard to the receipts and D expenses. Any such undertaking necessarily covers many areas. Therefore, it is essential that the same method of rating shall be applied in all rating areas. Otherwise injustice will be done. The same method of rating must be applied in all areas in such a manner that individual hereditaments are not rated in such a way as to cause any E unfairness. That was the reason which gave rise to the profits basis. The *Kingston* case (1) laid down a rigorous rule. The only permissible departure from the formula is permitted by reason of the fact that there are special circumstances which render it necessary to exclude the recognised formula. In the present case, there are no special circum- F stances which render it necessary to depart from the profits basis. In no respect which affects rating does the respondent board's undertaking differ from any other electricity undertaking in the country. As far as the financial provisions are relied upon for establishing that the respondent board is of a special nature, the argument must fail. If the respondent G board is assumed to be a hypothetical tenant, it must not be regarded as an owner-occupier. It must be regarded as a tenant from year to year. In that capacity, it has no security of tenure. One is not driven off the profits basis because one arrives at a nil valuation by applying it. *Consett Iron Co., Ltd.* v. *Durham County Assessment Committee for No. 5 or* H *North-Western Area* (5) is not an authority for saying that a nil valuation can never be correct. The finding of "nil," in the present case, is the result of applying the rule. Quarter sessions took into consideration the accounts for 1934 as well as those for 1933. The rule of law begins, however, by taking into consideration the receipts and profits for the

previous year. One is envisaging a hypothetical prospective tenant. Such a person would want to know what facts were known about the hereditament at the particular time. It is not a justification for departing from the profits basis to say that the particular hereditament was not in the accounts for the previous year. The experience is a
A common one. When such a company extends its operations into a new area, the local authority for that area takes into consideration the last available accounts. [Counsel referred to *Railway Assessment Authority* v. *Southern Ry. Co.* (4), *Port of London Authority* v. *Orsett Union Assessment Committee* (6), *St. James' & Pall Mall Electric Light Co., Ltd.*
B v. *Westminster Assessment Committee* (7) and *R.* v. *London, Brighton & South Coast Ry. Co.* (8).]

Simes followed on the same side.

Turner, K.C., in reply.

C GODDARD, L.J. [delivering the judgment of the court]: This appeal is brought from a decision of the Divisional Court, who, on a special case stated by the Essex Quarter Sessions under the Rating and Valuation Act, 1925, s. 31 (5), answered the questions submitted in the case in favour of the respondents, thereby upholding the decision
D of quarter sessions. The respondents are a statutory body established under the Electricity (Supply) Act, 1926, for the purpose of distributing electricity to all parts of Great Britain by means of a network of transmission cables commonly known as the grid. They do not themselves generate current, but they buy it in bulk from other undertakings,
E and transform the voltage at various stations before transmission. From certain stations, known as selected stations, the board may buy the whole output and resell to the owners as much as they require for their own distribution, and this current would not pass through or over the board's stations or lines. For the purpose of this operation,
F Great Britain is divided into areas, Barking being in the south-eastern area, and the board's activities in the areas came into operation from time to time as the plant was developed and became available. During the period of development, the board had the right to borrow to pay interest on their issued capital, and, by sect. 11 of the Act, they were
G required to fix a tariff, so that over a period of years their receipts should be sufficient to cover their expenditure on income account. This term, as fixed by the Electricity Commissioners, was in the majority of cases 10 years, though for some areas a shorter term was prescribed. There are a variety of other provisions in the Act as to the board's trading
H which are set out in the special case, but we need not refer to them in detail for the purpose of this judgment.

The hereditament now in question consists of a transformer station and certain cables, transmission towers and wires, and their valuation was the subject of proposals and objections before the Southern Essex Assessment Committee for the year commencing Apr. 1, 1934. At the hearing before the committee, the appellants proposed a valuation of £8,436, and the respondents contended that the proper valuation was nil, but offered to accept a recommendation of the Central Valuation Committee for a valuation of £2,100 for the year beginning Apr. 1, 1934.

The respondents contended, as they have done throughout, that the proper basis of assessment was what is known as the profits basis. If that basis is adopted, it is not disputed that the valuation will be nil. The committee appear to have accepted the respondents' contention, but, in consequence of their offer to accept a figure of £2,100, they fixed that sum, and it was against that valuation that the rating authority appealed to quarter sessions. There was no cross-appeal, and, on the hearing, quarter sessions held that the proper basis was the profits basis, and that the true valuation was nil, but, as there was no cross-appeal, they upheld the decision of the assessment committee and dismissed the appeal.

It was stated before us that quarter sessions held that they were bound to adopt the profits basis by reason of the decision of the House of Lords in *Kingston Union* v. *Metropolitan Water Board* (1), and we approach this case, as did the Divisional Court, on the footing that quarter sessions did so hold. Since that decision, in our opinion, it must be regarded as a rule of rating law that, in the case of a public utility undertaking whose operations extend over areas beyond the limits of an individual parish, the profits basis is the only method to be applied in fixing the value in any particular parish, unless there are some special circumstances which render that method impossible of application. We need not set out in this judgment the theory on which this basis is founded. It has been applied ever since the judgment of the Queen's Bench in *R.* v. *Mile End Old Town* (*Churchwardens & Overseers*) (2), followed by *R.* v. *West Middlesex Waterworks* (3), and is fully explained by Viscount Hailsham, L.C., in *Railway Assessment Authority* v. *Southern Ry. Co.* (4), at p. 275.

However, counsel for the appellants contended that, because of the special rights and duties conferred on the respondents by the statute, they were so different from those undertakers to whose hereditaments the doctrine had been hitherto applied as to make it wholly inapplicable in this case. With this we cannot agree. They are eminently a public utility corporation and a profit-making corporation, and the only difference between their undertaking and that of the Metropolitan Water Board or any other like concern, for rating purposes, is that the total ambit of their areas of supply is far greater, which, indeed, would seem to be all the more reason why the doctrine should apply to their hereditaments.

It was further contended that, if the doctrine did apply, the circumstances set out in detail in para. 14 of the case were sufficiently special to render the doctrine inapplicable to their undertaking. Both Viscount Cave, L.C., in the *Kingston* case (1) and Viscount Hailsham, L.C., in the

Southern Railway case (4) said that there might be special circumstances which would render the doctrine inapplicable, though no indication was given in either case as to what circumstances would or might be sufficient. We are satisfied, however, that there are none here, and, as we agree entirely with the reasons given by the Divisional Court in their detailed examination of para. 14 of the special case, we do not propose to repeat the reasons which they gave. It is unnecessary to decide whether what constitutes a circumstance sufficiently special to make the profits basis inapplicable is a question of fact, as was held by the Divisional Court, or one of law, and on this point we reserve our opinion.

The other question raised by the case is whether the estimates of the board subsequent to 1934 were rightly excluded by quarter sessions. It appears that the appellants called for these documents, and that the respondents objected to produce them on two grounds—namely, (i) that they could not be obliged to produce the estimates, as they were private material, and that a ratepayer is not obliged to produce his private papers for the purpose of enabling the rateable value to be ascertained, and (ii) that in any case only the accounts down to Apr. 1, 1934, were relevant. As quarter sessions expressed the opinion that accounts down to Apr. 1, 1934, were relevant, the respondents produced the accounts for the whole of 1933 and 1934. They could not show accounts to Apr. 1 only, as their financial year ended on Dec. 31.

In our opinion, it is settled by the two cases, the *Kingston* case (1) and the *Southern Ry. Co.* case (4), to which we have already referred that the profits basis has to be calculated, not on what may happen in the future, but on the profits ascertained down to the latest period before the date of the rate, or, in this case, the preparation of the valuation list, and, therefore, quarter sessions were right in excluding evidence as to events subsequent to 1934 as being irrelevant. The accounts to Apr. 1, 1934, were relevant, and those subsequent to that date were irrelevant. Moreover, as it was conceded that the respondents could not have been obliged to produce, and did not produce, the estimates for subsequent years, the question whether they contained anything relevant or irrelevant does not arise. They were not in evidence, and the respondents were entitled to take the objection that they were private documents and exempt from production, and it follows that the appellants were not entitled to cross-examine the respondents' witnesses to find out the contents of existing documents which were in effect privileged. On this matter also we agree with the Divisional Court. The appeal fails, and is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Lees & Co.*, agents for *E. R. Farr*, Town Clerk, Barking (for the appellants); *Richard H. Fox*, Solicitor, Central Electricity Board (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

KING FEATURES SYNDICATE INC. AND SEGAR *v.* O. AND M. KLEEMANN, LTD.

[Court of Appeal (Scott, Clauson and Luxmoore, L.JJ.), **May 23, 24, 28, 29, 30, July 8, 1940.**]

Copyright—Infringement—Cartoons depicting sailor—Reproduction in form of brooches and toys—Whether cartoons designs capable of being registered under Patents and Designs Acts, 1907-1938*—Copyright Act,* 1911 (*c.* 46), *ss.* 1 (2), 2 (1), 22, 25*—Patents and Designs Acts,* 1907-1938, *s.* 93.

S. was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as "Popeye" or "Popeye the Sailor," and it was admitted that, if there was copyright in these drawings or cartoons, which were published from 1929 onwards in the United States of America and simultaneously in Canada, it was vested in the plaintiffs or one of them. The defendants, without the consent of the plaintiffs, caused to be made and imported into the United Kingdom, and have there sold, representations in various forms of a figure which they admitted to be the figure of a sailor. The material forms in which this figure was embodied were brooches or charms, plaster dolls and mechanical toys largely composed of celluloid. The plaintiffs claimed that the figure was that of "Popeye the Sailor," and sued the defendants for damages for infringement of copyright and for an injunction. At the hearing they produced 55 drawings selected from among many thousands of drawings of Popeye which had appeared, and upon this it was contended on behalf of the defendants that, as their articles were admittedly copied from articles made by the plaintiffs' licensees, and as it had not been proved or admitted that the latter articles had been copied from the 55 rather than from the thousands of other drawings, it was not proved that any copyright had been infringed:—

Held: (i) where an artistic work in which copyright is claimed is a drawing in two dimensions, the copyright can be infringed by a toy figure which is in three dimensions.

(ii) it is immaterial whether the infringing article is derived directly or indirectly from the original work.

(iii) (Luxmoore, L.J., *dissenting*): the plaintiffs' works were designs capable of being registered under the Patents and Designs Acts, 1907-1938, and, therefore, were not protected by the Copyright Act, 1911.

(iv) the plaintiffs had not differentiated between the selected 55 drawings, so far as publication was concerned, and made no admission upon which the defendants could rely for the suggestion that there were Popeye drawings in which no copyright subsisted. The plea on this ground was ill-founded.

Decision of Simonds, J. ([1940] 2 All E.R. 355) *varied.*

[**EDITORIAL NOTE.** This case confirms previous decisions which have recognised an infringement of the copyright of a drawing in two dimensions by a figure or solid in three dimensions. The more important part of the decision, however, is whether designs such as the well-known Popeye cartoons are designs capable of being registered under the Patents and Designs Acts, 1907-1938, for, if they are, they will not be protected by the Copyright Act, 1911, by reason of the exception enacted in sect. 22 (1) of that Act. This, of course, is purely a question of construction, and the decision is that these are designs capable of such registration.

As to Exclusion of Certain Designs from Copyright, see HALSBURY, Hailsham Edn., Vol. 7, pp. 528, 529, para. 831; and for Cases, see DIGEST, Supp., Copyright, Nos. 108a-111a.]

Cases referred to:

(1) *Burke & Margot Burke, Ltd.* v. *Spicers Dress Designs,* [1936] Ch. 400; [1936] 1 All E.R. 99; Digest Supp.; 105 L.J.Ch. 157; 154 L.T. 561.

(2) *Re Clarke's Design*, [1896] 2 Ch. 38; 43 Digest 248, *896*; 65 L.J.Ch. 629; *sub nom. Re Clarke's Registered Design, Clarke* v. *Sax & Co., Ltd.*, 74 L.T. 631.

(3) *Dean's Rag Book Co., Ltd.* v. *Pomerantz & Sons & Re Dean's Rag Book Co., Ltd., and the Patents and Designs Acts, 1907 to 1928* (1930), 47 R.P.C. 485; Digest Supp.

(4) *Pytram, Ltd.* v. *Models (Leicester), Ltd.*, [1930] 1 Ch. 639; Digest Supp.; 99 L.J.Ch. 381; 143 L.T. 227.

(5) *Wood* v. *Stoddarts* (1931), MacGillivray's Copyright Cases (1928 to 1935), 294.

(6) *Re English Electric Co., Ltd. (No. 777,313) Application for Registration of a Design* (1933), 50 R.P.C. 359; Digest Supp.

(7) *Kestos, Ltd.* v. *Kempat, Ltd., and Vivian Fitch Kemp, Re Kestos, Ltd., Registered Design (No.* 725,716) (1935), 53 R.P.C. 139; Digest Supp.

(8) *Preston* v. *Raphael Tuck & Sons*, [1926] Ch. 667; Digest Supp.; 95 L.J.Ch. 382; 135 L.T. 93.

(9) *Saunders* v. *Wiel*, [1893] 1 Q.B. 470; 43 Digest 250, *910*; 62 L.J.Q.B. 341; 68 L.T. 183.

(10) *Hanfstaengl* v. *Empire Palace, Ltd.*, [1894] 3 Ch. 109; 13 Digest 210, *460*; *on appeal, sub nom. Hanfstaengl* v. *Baines & Co.*, [1895] A.C. 20.

(11) *Gramophone Co., Ltd.* v. *Stephen Cawardine & Co.*, [1934] Ch. 450; Digest Supp.; 103 L.J.Ch. 248; 150 L.T. 396.

(12) *Brooks* v. *Religious Tract Society* (1897), 45 W.R. 476.

(13) *Bradbury, Agnew & Co.* v. *Day* (1916), 32 T.L.R. 349; 13 Digest 210, *459*.

(14) *Chabot* v. *Davies*, [1936] 3 All E.R. 221; Digest Supp.; 106 L.J.Ch. 81; 155 L.T. 525.

(15) *Fleicher Studios* v. *Freundlich* (1934), 5 Fed. Supp. 808.

(16) *King Features Syndicate* v. *Fleicher* (1924), 299 Fed. Rep. 533.

APPEAL by the defendants from an order of SIMONDS, J., dated Mar. 20, 1940, and reported [1940] 2 All E.R. 355. The facts are fully set out in the judgment of LUXMOORE, L.J.

K. E. Shelley, K.C., and *G. S. W. Marlow* (for *A. D. Russell-Clarke* on war service) for the appellants.

E. J. Macgillivray, K.C., and *Frank Gahan* for the respondents.

Shelley, K.C.: Four monoplies only are known to the English law—namely, trade marks, patents, registered designs, and copyright. The designs in question are registrable as designs, and, therefore, they cannot be the subject-matter of copyright by reason of the provisions of the Copyright Act, 1911, s. 22. That Act does not apply to designs capable of being registered under the Patents and Designs Acts. As the designs were not in fact registered under the Patents and Designs Acts, the defendants are entitled to sell the articles. The dolls are not infringements of the plaintiffs' works, because they are not a reproduction of a substantial part of those works. The plaintiffs license other persons to sell dolls and brooches which are to all intents and purposes identical with those sold by the defendants. The defendants copied the articles made by the plaintiffs' licensees. They claim the right to do so because the designs are registrable and have not been registered. The effect of the Copyright Act, 1911, s. 22, is that, if an article is capable of being registered as a design under the Patents and

Designs Acts, no section of the Copyright Act, 1911, applies to it. The defendants admit that there is copyright in the cartoons as cartoons. They say, however, that the character of Popeye does not constitute a substantial part of the drawings. A burlesque of a character is not an infringement even if there is the same idea in both. As far as the plaintiffs' claim is a claim for copyright, it is a claim not known to the A English law. There is a difference between claiming copyright in a scheme and claiming copyright in a general notion of a character which may be used in many schemes. In order that the plaintiffs may succeed, they must show that the doll infringes a particular picture. Popeye is a character in the pictures, and the idea of Popeye may have been B reproduced. [Counsel referred to the Patents and Designs Act, 1907, ss. 49 (2), 50, 53, 60.] I rely upon *Dean's Rag Book Co., Ltd.* v. *Pomerantz & Sons, Re Dean's Rag Book Co., Ltd., and Patents and Designs Acts, 1907 to 1928* (3) for the proposition that the articles which the defendants have sold are registrable designs. Inherently they are C registrable designs, and, therefore, they are outside the scope of the Copyright Act, 1911. [Counsel referred to *Pytram, Ltd.* v. *Models (Leicester), Ltd.* (4), *Wood* v. *Stoddarts* (5), *Burke & Margot Burke, Ltd.* v. *Spicers Dress Designs* (1), *Re English Electric Co., Ltd. (No. 777,313) Application for Registration of a Design* (6), *Kestos, Ltd.* v. *Kempat,* D *Ltd., and Kemp* (7) and *Preston* v. *Raphael Tuck & Sons* (8).]

Macgillivray, K.C.: The first drawing is admitted to be an original drawing, and there is a figure of Popeye on the first strip. There is an original artistic conception, and the dolls in question are a reproduction of the artistic conception which lies behind the drawings. E However, the first drawing is not the only one upon which reliance can be placed. It is the artistic conception which lies behind the line and the configuration which is now protected by the law. It is not the form, but it is that which lies behind the form, which is protected. The appellants cannot succeed under the Copyright Act, 1911, s. 22, unless F they can establish that the drawing is a design capable of being registered, or unless they can establish that the Act does not apply at all to a design capable of being registered and that no such design shall be deemed to be an infringement of copyright. This, of course, is subject to exceptions. As SIMONDS, J., has pointed out, the use of the word G "design" in sect. 22 is not strictly accurate. A design which is capable of registration is a conception. The design is applied to the article. In order to bring the language of sect. 22 into conformity with that of the definition, it must be read as meaning that it shall not apply "when the design for this drawing is capable of registration." It is clear that H in the present case it is not. No design for a toy existed until an inventive faculty turned it into a three-dimensional figure. Even when the idea of a toy was conceived, this design was not registrable. From the beginning, the respondents have had copyright in that drawing which contains a representation of Popeye. The doll is a reproduction of a

substantial part of that drawing, although the reproduction is in another medium. The design is taken from something to which the respondents have an exclusive right. It is not taken from a source which is common to all, as in *Saunders* v. *Wiel* (9). There was no design for a toy until the three-dimensional idea was conceived. No design for a toy came into
A being until the respondents' licensees produced the article which is substantially identical with the appellants' figures. If it could be said that part of the respondents' drawing was capable of registration as a design, it would be an answer that that drawing was not used, and was never intended to be used, as a model or pattern to be multiplied for
B industrial purposes. It would be straining the definition of a design in the Patents and Designs Act, 1907, s. 93, and it would be an abuse of language, to say that a painting or drawing is applied to paper for the ornamentation of paper. [Counsel referred to *Saunders* v. *Wiel* (9), *Hanfstaengl* v. *Baines & Co.* (10), *Gramophone Co., Ltd.* v. *Stephen*
C *Cawardine & Co.* (11), *Brooks* v. *Religious Tract Society* (12), *Bradbury, Agnew & Co.* v. *Day* (13), *Chabot* v. *Davies* (14), *Preston* v. *Raphael Tuck & Sons* (8), *Fleicher Studios, Inc.* v. *Freundlich* (15) and *King Features Syndicate, Inc.* v. *Fleicher* (16).]

Shelley, K.C., in reply.

D

SCOTT, L.J.: I think that it will be convenient for CLAUSON, L.J., to read his judgment first.

CLAUSON, L.J.: In this action, the plaintiffs are claiming the usual
E relief in respect of an alleged infringement by the defendants of the plaintiffs' copyright in certain drawings, and SIMONDS, J., has held that they are entitled to that relief in respect of certain dolls and other articles marketed by the defendants. He rightly pointed out that the first question to be determined was whether, apart from the Copyright Act,
F 1911, s. 22, the articles of which the plaintiffs complain are such reproductions in a material form of the plaintiffs' work as to constitute infringements of the plaintiffs' copyright. As regards the doll Exhibit B.1., which is a specimen of a very large number of precisely similar dolls manufactured by the defendants, it is impossible to doubt that it is a
G reproduction in a material form of a substantial part of an original artistic work of the plaintiffs, being the sketch No. 3 published in the NEW YORK EVENING JOURNAL of Jan. 17, 1929. In that sketch, the background and accessories are so wholly subordinate to the one figure delineated that the sketch is little more than a sketch of the figure, which
H is a grotesque representation of a sailor. A comparison of the specimen doll with that sketch leads inevitably to the conclusion that the doll is a reproduction in material form of the figure sketched, and is, accordingly, a reproduction in material form of a substantial part of the artistic work constituted by the sketch No. 3. A number of other sketches subsequently published by the plaintiffs were put in evidence in which

the same figure appears as the principal feature in the representation of a number of humorous incidents. It was suggested that the existence of those other sketches makes it doubtful whether the court could properly infer that the specimen doll reproduced a substantial part of sketch No. 3, and it was suggested that in fact the designer of the specimen doll had copied, not the original sketch No. 3, nor any of the other sketches, but a doll made by a licensee of the plaintiffs to represent the figure delineated in the sketches. There can be no doubt at all that a figure which in fact reproduces an original artistic work consisting, in substance, of a sketch of that figure is none the less a reproduction of the original artistic work because the maker of it has copied it, not directly from the original, but from some representation derived directly or indirectly from the original work. It seems to have been suggested in the court below that the fact that the alleged infringement was in three dimensions whereas the original was in two dimensions prevented the plaintiffs from making good their claim. I agree with the judge that, while this circumstance may add to the difficulty of forming a conclusion on the degree of resemblance between the infringing article and the original, the plain words of the Act (" in any material form ") get rid of any difficulty there might otherwise have been in treating a copy in three dimensions as an infringement of copyright in a sketch in two dimensions. I cannot agree with the suggestion that the decision in *Burke & Margot Burke, Ltd.* v. *Spicers Dress Designs* (1) gives colour to any different view.

In the view thus expressed, but for the point of law dealt with below, the plaintiffs would be entitled to a declaration that articles in the form of the specimen doll and other exhibits which are mere variations of that specimen doll are infringements of the plaintiffs' copyright in the sketch No. 3, and an injunction restraining the defendants from infringing the copyright of the plaintiffs in the sketch No. 3 by making or causing or authorising to be made, without the consent of the plaintiffs, articles reproducing in material form the figure of a sailor delineated in the sketch No. 3 or by selling the same or by way of trade exposing or offering the same for sale. The injunction granted in the court below was framed in somewhat wider terms, however, on the ground, as it would seem, that certain brooches were similarly infringements of some or other of the plaintiffs' sketches. This matter is not specifically referred to by the judge. For the purpose of this case, it will suffice to say that, on a careful comparison of the brooches with the various drawings, I cannot find sufficient similarity to satisfy me that the brooches are such reproductions as to infringe the plaintiffs' rights, whether in the sketch No. 3 or in any other of the sketches which were in evidence. Accordingly, assuming the point of law arising under sect. 22 of the Act and dealt with below to be decided in favour of the plaintiffs, in my view, they would not be entitled to any relief wider than would be given by the declaration and injunction indicated above. On the same assumption, the inquiry should run as follows : "An inquiry what damages (if any) have been sustained by the plaintiffs by reason of the infringement by the defendants as in the above declaration mentioned of the plaintiffs' copyright in the sketch No. 3 and by reason of the conversion by the defendants of articles which so infringe the plaintiffs' said copyright."

A However, a further point remains to be considered—namely, whether sect. 22 of the Act prevents the plaintiffs from obtaining relief in certain circumstances which are stated in the judge's judgment and may be summarised as follows. In 1937, the plaintiffs were minded to make money out of the sale of models in the form of the figure in sketch No. 3 B which I have already mentioned, and they did so by licensing certain persons to reproduce that figure in a material form, with a view to such reproductions being used as a model or pattern to be multiplied by an industrial process. In fact, a very large number of such reproductions has been made, the reproductions being in fact, as was agreed, sub- C stantially in the form of the specimen doll. Indeed, it was suggested, and seems to be the case, that the defendants' specimen doll was, as a matter of historic fact, copied from one of these licensed reproductions. Neither the plaintiffs nor their licensees have registered any reproduction of the figure under the Patents and Designs Acts.

D The defendants contend that, on these facts, the plaintiffs have lost the right to restrain the defendants from reproducing the figure in sketch No. 3 in a material form by reason of the provisions of the Copyright Act, 1911, s. 22. The steps in the reasoning which lead to this result can be stated as follows. With the authority of the plaintiffs, their licensees E reproduced the figure sketched in sketch No. 3 in a material form by applying that figure's features of shape and configuration to a model. Those licensees thus became for the purposes of the Patents and Designs Acts, by virtue of the definition of "proprietor of a new or original design" in sect. 93 (*b*), proprietors of the design of that model, and thus F became qualified to register the design constituted by that model under sect. 49 of the Act. It is well-settled (see *Re Clarke's Design* (2)) that the fact that the figure sketched had been already published to the world before it was used as a prototype of a three-dimensional figure would not prevent the design from being a new or original design within the meaning G of the Patents and Designs Acts as a design to be applied to an article. Apart from the definition of "article" contained in the Patents and Designs Acts (see sect. 93), it might have been suggested that a design could not be registered unless it were intended to be applied to an article of manufacture with an existence or a function independent of the design. H This suggestion is disposed of, however, by the fact that the word "article" is defined in sect. 93 to include "any substance artificial or natural or partly artificial and partly natural." Therefore, it would appear to follow that the mere reproduction of the sketch of the figure in question by copying it in a material substance produces a design which the proprietor may register.

If it be the fact that the plaintiffs' licensees thus became qualified to register the three-dimensional representation of the figure in question as a design under the Patents and Designs Acts, it must follow that a three-dimensional representation of the figure is a design capable of being registered under the Patents and Designs Acts. On turning to the Copyright Act, 1911, s. 22, one finds that the Act is not to apply to designs capable of being registered under the Patents and Designs Acts if such designs are used or intended to be used as models or patterns to be multiplied by any industrial process. In the present case, it is clear on the facts that the design—that is to say, the representation of the grotesque sailor in three-dimensional form—is in fact used—namely, by the plaintiffs' licensees—as a model or pattern to be multiplied by an industrial process. Hence, the effect of sect. 22 would seem to be that, in the circumstances, the Copyright Act, 1911, does not now apply to the design in question—that is to say, to the representation of the grotesque sailor in three dimensions.

If this view of the operation of sect. 22 is correct, it is obvious that the plaintiffs must fail in the present action, since the infringement of which they complain is an infringement by reproducing in a three-dimensional form their representation of a grotesque sailor. Whether or not this view of the law, which emerged in the course of argument before this court, was presented by the defendants to the judge does not clearly appear. He decided that sect. 22 was no bar to the plaintiffs' success in the action. The ground of his decision appears to be that the sketch alleged to be infringed could not be registered as a design, since it was not produced as a model or pattern to assist in making some other thing. He seems to adopt the view, though with some hesitation, that, if the original artistic work had been a work of sculpture, it would have been capable of being registered as a design, presumably because its features of shape and configuration would be capable of being applied as a pattern to assist an artificer in making some other article. He seems to regard sect. 22 as inapplicable, however, because, as he points out, the plaintiffs' sketch cannot itself be registered as a design. That may well be so, but that does not meet the point, which is the defendants' sheet anchor, that a representation of the plaintiffs' sketch in a material form may well be—indeed, would appear plainly to be—a design capable of being registered under the Patents and Designs Acts.

It is helpful to consider what, on the defendants' interpretation of sect. 22, is the result as regards such a sketch as that now in question. The plaintiffs have the copyright in the sketch for 50 years or more. They may themselves make a reproduction of the sketch in a material form and use that reproduction as a model or pattern to be multiplied by an industrial process. If so, they lose the right to prevent others from making a like reproduction of the sketch, but they have the right, on registering this reproduction under the Patents and Designs Acts, to a monopoly in the design for a period which may ultimately extend to

15 years from the date of registration. In the first instance, no one but the plaintiffs can produce the design from the sketch without the plaintiffs' permission, but, if the plaintiffs permit a licensee to produce the design from the sketch with a view to multiplication of it by an industrial process, the plaintiffs' artistic copyright in that design—that is, in that
A reproduction of the sketch in a material form—vanishes, though the licensee can secure the 15 years' industrial copyright in that design by registration. A construction of sect. 22 which leads to this result seems to be a perfectly reasonable construction. It must be borne in mind that, before the Act of 1911, the plaintiffs, as makers of the sketch,
B would have had no right to prevent the reproduction of their sketch in a material form. If they desired to prevent reproduction of the sketch in three-dimensional form as a model to be multiplied by an industrial process, they could attain their object only by themselves producing the model and registering it under the Patents and Designs Acts, in which case
C they would secure monopoly for 15 years, but for no longer, in the design.

The extension of artistic copyright by the Copyright Act, 1911, so as to prevent reproduction in a material form made it essential to make some such provision as is contained in sect. 22. Otherwise, the Patents and
D Designs Acts would in practice have ceased to exist, so far, at all events, as concerns designs intended for multiplication by an industrial process copied from a sketch and applied to "articles," as defined by the Patents and Designs Acts, 1907-1938, s. 93:

> E . . . any article of manufacture and any substance artificial or natural, or partly artificial and partly natural:

But for sect. 22, every author of an artistic work would have the right for the copyright period of at least 50 years to prevent any design copied from his work being used for multiplication by an industrial process.
F Such a change in the rights of the author of an artistic work would not only operate as a very great extension of his monopoly but would also cut across the policy of the Patents and Designs Acts, which is to confine monopoly in designs used for multiplication by an industrial process to a period of 15 years and to designs which are publicly registered as protected
G by the Act.

In the present case, neither the plaintiffs nor their licensees have registered under the Patents and Designs Acts the design copied from the plaintiffs' sketch and multiplied by an industrial process. It follows that the defendants cannot be prevented by anything in the Patents and
H Designs Acts from copying that design, and the Copyright Act, 1911, s. 22, has the effect, in the circumstances of the case, of excluding from the copyright vested in the plaintiffs under that Act the right to prevent any reproduction of their sketch which reproduces the design taken from it which might have been, but has not been, registered under the Patents and Designs Acts. The defence set up under the Copyright Act, 1911,

s. 22, should thus succeed, in my judgment. The appeal should be allowed, and the action should be dismissed with costs in both courts.

Luxmoore, L.J. [read by Clauson, L.J.]: This action was instituted on June 3, 1938, by King Features Syndicate Inc., hereinafter referred to as the syndicate, and Elzie Crisler Segar against O. and M. Kleemann, Ltd., hereafter referred to as the defendant company. The object of the action was to obtain an injunction to restrain the infringement by the defendant company of copyright alleged to be vested in the plaintiffs, or in one of them, in respect of a number of drawings. The plaintiffs also claimed damages and other ancillary relief usual in copyright actions.

The drawings in respect of which copyright was claimed were alleged to be original artistic work within the definition contained in the Copyright Act, 1911, s. 35 (1), their author being the plaintiff Segar. The drawings relate to, and purport to depict, imaginary scenes and incidents in the life history of a fictitious character evolved by the plaintiff Segar and called by him "Popeye" or "Popeye the Sailor." They were prepared in sets or strips, each set or strip containing usually some 5 separate drawings. "Popeye," as I will call him, appears in each set or strip of drawings in various attitudes, but he is invariably portrayed as a grotesque figure dressed as a sailor, with a sailor's cap on the back of his head, wearing a sailor's jacket with the sleeves turned up above the elbow so as to show an anchor on each forearm, and wearing also very wide bell-shaped trousers with enormous boots showing beneath. He has a pipe sticking out of an exceedingly wide mouth.

The first set or strip of drawings relating to "Popeye" was published for the first time in the United States of America and simultaneously in Canada in the issue of the New York Evening Journal of Jan. 17, 1929. It was alleged that each subsequent set or strip of drawings relating to "Popeye" was published for the first time simultaneously in the United States of America and Canada in subsequent issues of the New York Evening Journal. It is admitted that, under the relevant Canadian legislation, and by virtue of a certificate given under the Copyright Act, 1911, s. 25, the sets or strips so published confer on the original plaintiffs or one of them copyright in the United Kingdom, unless the right thereto is excluded by reason of the provisions of the Copyright Act, 1911, s. 22. The drawings appear to have become exceedingly popular, and have been reproduced under licence from the original plaintiffs in newspapers and journals in the United States of America and Canada, and subsequently in this country, while in or about 1937 the syndicate granted licences to certain persons or companies to manufacture and sell in the United Kingdom mechanical dolls and brooches, to use the words of the respective licences, "utilising the title of 'Popeye' and simulating the figure" of this fictitious character. The licences referred to provided for the payment to the plaintiffs of royalties in respect of the user authorised.

The defendant company, who are manufacturers and vendors of toys, approached the syndicate with a view to obtaining a licence for " the marketing of ' Popeye the Sailor.' " The application was originally made by the defendant company to the Paramount Film Service, Ltd., of 166, Wardour Street, London, in the mistaken belief that that firm was the owner of the copyright in the drawings. This application was forwarded by the Paramount Film Service, Ltd., to one Frank C. Betts, who was the agent of the syndicate, and the plaintiff Segar. On Mar. 13, 1937, Betts wrote to the defendant company stating that :

> . . . this character [" Popeye "] is the copyright of [the syndicate]. We are prepared to issue licences for novelties embodying this character and we shall be glad to know the precise novelty you have in mind. There are already a number of novelties in being.

The letter stated the terms generally required. The defendant company, in reply to this letter, stated that they were not interested " under the circumstances to handle the line under the conditions mentioned."

Before the two letters referred to were written, the defendant company had been in correspondence with one of its directors, who was then travelling in Japan, and had sent to him on Feb. 24 :

> A sample of brooch, Popeye Sailor, which is being sold in large quantities to showmen.

The letter contained this statement :

> It [the Popeye brooch] is being sold by Cecil Coleman at 12*s.* per gross, and I think we could do quite a big business in this.

In the result, the defendant company gave an order to a firm in Japan known as Winckler & Co., of Kobe, and goods dispatched by that firm to the defendant company in the United Kingdom were invoiced under the description :

> Popeye brooches each on a card, 200 gross, 5*s.* 6*d.* per gross.

This was followed by numerous other consignments of similar brooches, and, at a later date, by consignments of celluloid mechanical figures and plaster dolls described in the relative invoices as " Cell. Popeye " or " Plaster-filled Popeye " or " Clay-filled figure Popeye " or " Mechanical Popeye toy," or by some other similar title. Some of these importations were made after the writ in this action was issued. Counsel for the plaintiffs and for the defendant company respectively invited the judge to deal with the matter on the footing that all the goods referred to were imported to this country before the writ was issued.

As I have already stated, the writ was issued on June 3, 1938. It claimed :

> . . . an injunction, damages and other appropriate relief in respect of the infringement of their copyright in the " Popeye " cartoons published in the issue of the NEW YORK EVENING JOURNAL for Jan. 17, 1929, and in later issues of the same journal and in other publications by making without the consent of the plaintiffs models, photographs, drawings, brooches, toys and other articles reproducing in material form the " Popeye " figure in the said cartoons and/or selling or offering the same for sale.

While the action was pending—namely, on Oct. 13, 1938—the plaintiff Elzie Crisler Segar died, and on Nov. 22, 1938, Frank Cecil Betts became his legal personal representative in this country. He was added as a co-plaintiff with the syndicate in the place of E. C. Segar by an order made in this action on Dec. 7, 1939.

In the course of the interlocutory proceedings, the plaintiffs, for convenience, selected from the large number of sets or strips of drawings relating to "Popeye," which were said to exceed 2,000, some 55 sets A
or strips of drawings, including the set or strip first published in the NEW YORK EVENING JOURNAL on Jan. 17, 1929. The plaintiffs claim that all the articles imported from Japan infringe their copyright. Samples of the Popeye brooches imported by the defendant company were produced at the trial, and samples of the celluloid mechanical B
figures and plaster dolls were also produced at the trial. It will be seen that the figures and dolls last mentioned are practically identical in design, the only difference being in size and material.

The defendant company relied upon a number of defences. First, it was contended that, assuming that the plaintiffs were entitled to C
copyright in the sets or strips of drawings referred to, such copyright, being in drawings in two dimensions, could not be infringed by the production of an article in three dimensions. The second contention was that the articles alleged to constitute infringement of the plaintiffs' copyright, assuming that it existed, did not reproduce any substantial D
part of the plaintiffs' work, and, in this connection, a subsidiary contention was raised on behalf of the defendant company, to the effect that the alleged infringing articles could not be reproductions of any work in which the plaintiffs claimed copyright, because the imported articles were copied from the articles made by the plaintiffs' licensees, E
and not from any of the original drawings, although it was admitted that such licensees had designed the brooches and dolls or toys made by them from some one or other of such drawings. The third contention put forward on behalf of the defendant company was that, as the defendant company's brooches, dolls or toys were respectively copied F
from similar articles made by the plaintiffs' licensees, and, as it had not been proved or admitted that, (i) the latter articles had been derived from any of the drawings comprised in the 55 sets or strips upon which the plaintiffs had relied rather than from any other of the Segar drawings, or (ii) any of the Segar drawings other than the 55 sets G
or strips had been published in Canada simultaneously with publication in the United States of America, it was not proved that any copyright had been infringed. The fourth and last contention of the defendant company was based on the Copyright Act, 1911, s. 22. As stated by SIMONDS, J., in his judgment, the question was whether the works in H
which the plaintiffs claimed copyright consist of designs which are capable of being registered under the Patents and Designs Act, 1907, and do not fall within the exception contained in the section. SIMONDS, J., answered each of these contentions in favour of the plaintiffs, granted the plaintiffs the appropriate injunction and the relief

usually granted to a successful plaintiff in an action for infringement of copyright, and ordered the defendant company to pay the plaintiffs' costs of the action. The defendant company has appealed to this court, and has raised the same contentions as those which were raised before SIMONDS, J., and has in addition contended that, even if the Copyright
A Act, 1911, s. 22, had no application at the date when the plaintiffs' copyright in the drawings was acquired, yet, by reason of its provisions, in the events that have happened, the plaintiffs have lost the right to restrain infringement, because the plaintiffs' licensees became entitled to register the models made by them under their licence as designs
B under the Patents and Designs Act, 1907.

I propose to deal with each of the contentions raised in the order in which I have stated them. First, if one assumes that the plaintiffs are entitled to copyright apart from either of the contentions raised under the Copyright Act, 1911, s. 22, do the articles of which the plaintiffs
C complain infringe the copyright in any of the Segar drawings on which reliance is placed by the plaintiffs ? In considering this question, I think that it is essential to bear in mind (i) that there is no copyright either in the fictional character as such appearing throughout the whole of the sets or strips of drawings or in the titles " Popeye " or " Popeye
D the Sailor," and (ii) that the question of infringement must be considered with reference to a particular drawing, and not in respect of a set or strip of drawings, or a number of such sets or strips. Therefore, I will take the first drawing in which " Popeye the Sailor " appeared—namely, drawing No. 3 in the set or strip of drawings published in the NEW
E YORK EVENING JOURNAL on Jan. 17, 1929—because it is on this drawing that all the subsequent representations of " Popeye " are based, and I will compare it with the specimen doll. Although this drawing is in two dimensions and the specimen doll is in three dimensions, it is plain beyond possibility of doubt that the specimen doll is either directly
F or indirectly derived from the drawing. Every feature of the figure depicted in the drawing is reproduced in the doll, which appears to be a reproduction of the figure depicted in the particular drawing, to use the words of the Copyright Act, 1911, s. 1 (2), in a " material form." As SIMONDS, J., pointed out in his judgment, the words " in any material
G form whatever " are not to be found in the Fine Arts Copyright Act, 1862, and their presence in the Copyright Act, 1911, lays at rest any doubt which might have been felt with regard to the infringement of a two-dimensional drawing of a figure by a three-dimensional representation of the same figure. I find myself in entire agreement with
H the judgment of SIMONDS, J., on this point and also with that of my brethren in this court. I also am unable to find any support for the appellants' contention in the judgment of CLAUSON, J., in *Burke & Margot Burke, Ltd.* v. *Spicers Dress Designs* (1).

The second contention was that there was no infringement because the infringing articles did not reproduce any substantial part of the

plaintiffs' work. With regard to dolls or toys, of which the specimen doll is an example, I find that the drawing above referred to with which I compared the specimen doll consists of the figure of " Popeye " alone. He is depicted as standing on a pier with a large bollard in the background, and in the far distance there is a suggestion of cottages. In the drawing, the background and distance occupy an entirely subordinate A
position in relation to the figure, which can only properly be described as the substantial feature of the drawing. I agree with the judge and with my brethren that this contention fails. With regard to the brooches, which SIMONDS, J., held to infringe the plaintiffs' copyright, I have arrived at the same conclusion as that of my brethren in this court, B
because, having compared each of the figures reproduced on the two brooches with the available drawings, I have been unable to find any substantial resemblance between either of the brooches and any of these drawings. I think that no relief ought to be given in respect of this part of the claim. With regard to the point raised by the defendants C
under this head—namely, that the alleged infringing specimen doll could not be said to reproduce any substantial part of the plaintiffs' drawing because it was copied from an article made by the plaintiffs' licensees—if this be the fact, there can be no doubt that the licensees reproduced their figure of " Popeye " from the first drawing, or from D
some later reproduction of the figure appearing in the first drawing, and I respectfully agree with the judgment of the judge, and do not desire to add anything to it. The third contention appears to merit the strictures made with regard to it by SIMONDS, J. I am in entire agreement with the reasons for which he rejected this contention, and E
I respectfully adopt them.

There remain the contentions based on the Copyright Act, 1911, s. 22, which provides as follows :

> (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, F
> are not used or intended to be used as models or patterns to be multiplied by any industrial process.

The Patents and Designs Act, 1907, has been extended and to some extent repealed, and is now represented by the Patents and Designs Acts, 1907-1938, hereinafter referred to as the consolidated Act. The G
short answer to the first argument under this head appears to be that the drawings, of which No. 3 in the first strip is an example, are not capable of registration as designs under the consolidated Act. By that Act, " designs " are defined in sect. 93 as being :

> . . . only the features of shape, configuration, pattern, or ornament applied to H
> any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye ; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device.

" Article " is defined in the same section as meaning :

> . . . any article of manufacture and any substance artificial or natural, or partly artificial and partly natural :

In the present case, although it is obvious that any of the drawings might be reproduced in the original form by some industrial process or means, as in fact they were in the various newspapers in which they appeared, it is equally plain that none of the drawings could be applied in their original form to any article as defined by sect. 93 of the consolidated Act, and that, before anything based on any of the drawings could be so applied, a model or pattern must first be evolved from it or them. A model or pattern so evolved could undoubtedly be registered as a design under the consolidated Act, but the model or pattern in that case is a different thing from the drawing to which artistic copyright attached under the provisions of the Copyright Act, 1911, s. 1. Further, if the model or pattern is evolved by any person other than the owner of the artistic copyright in the basic drawing, the consent of the owner must be obtained for the evolution of the model or pattern, for the reasons already stated in connection with the first contention. It must, in the absence of such consent, of necessity infringe his copyright. No doubt, if the necessary consent is obtained, the person responsible for the making of the model or pattern could, as the proprietor of a new and original design, register the model or pattern under the consolidated Act, but in that case the registration could only protect the model or pattern as registered, and would not prevent the registration of some other model or pattern, derived from the same drawing, or from some other drawing of "Popeye," provided that the differences between the two models or patterns are sufficiently distinctive. Indeed, it may well be possible to evolve independently a number of distinctive models or patterns of "Popeye" from the same drawing, each of which could be registered as a design under the consolidated Act, for it is well-settled that, in cases where, as in the case of "Popeye," the subject-matter of a registered design is well-known, the protection is narrower than where the subject-matter is not well-known: see *Dean's Rag Book Co., Ltd.* v. *Pomerantz & Sons & Re Dean's Rag Book Co., Ltd., and the Patents and Designs Acts, 1907 to 1928* (3) at p. 491, and the cases there cited. In any such case, however, it is the model or pattern which is capable of registration under the consolidated Act, and not the original drawing. The original drawing or drawings became the subject-matter of copyright by reason of the provisions of the Copyright Act, 1911, s. 1, for the period thereby defined. I find myself in agreement with the judgment of SIMONDS, J., on this point also.

With regard to the last contention—namely, that the plaintiffs have lost their artistic copyright by reason of the licence granted by them to the two licensees—it seems to me that the Copyright Act, 1911, s. 22, cannot be construed so as to deprive an artistic work, which is not capable of registration as a design under the consolidated Act, of the copyright originally acquired in respect of it by giving permission to a third party to use the work as the basis of a registrable design. On its true construction, the section appears to me to have no further object than to prevent the application of the Act to a work itself capable of registration as a design under the consolidated Act so as to confer on such work artistic copyright. I can find nothing in the section which deprives an artistic work, to which copyright has already attached, of that copyright because one of a number of possible registrable designs has, by consent of the owners of the copyright, been evolved from it. The Act itself certainly gives no hint that artistic copyright, when once obtained, may be lost either for the whole or for a part of the statutory period which has already been brought into existence by the Act. I find myself unable to agree with my brethren that by reason of the provisions of the Copyright Act, 1911, s. 22, the plaintiffs have been deprived of their artistic copyright in their drawings, or in the particular drawing No. 3, on the strip published on June 17, 1929, already mentioned.

I would dismiss this appeal with costs, but I would vary the order made by Simonds, J., by declaring that each of the samples of the celluloid mechanical figures and plaster dolls produced at the trial is an infringement of the plaintiffs' copyright in the drawing No. 3, and by limiting the injunction to be granted to the terms of that declaration. The inquiry as to damages should be " an inquiry what damages, if any, have been sustained by the plaintiffs by reason of the infringement by the defendant company of the plaintiffs' copyright in the drawing No. 3 and by reason of the conversion by the defendant company of the articles which so infringe the plaintiffs' copyright."

Scott, L.J.: I have read both my colleagues' judgments. I should have been prepared to adopt that of Clauson, L.J., as the judgment of the court. Like him, I accept the statement of facts contained in the judgment of Simonds, J., and find it unnecessary to repeat them. He and I, and also Luxmoore, L.J., agree with the judge that the specimen celluloid doll representing the comic figure of " Popeye the Sailor " and its smaller counterpart and its counterpart in another material *prima facie* constitute infringements of the plaintiffs' sketch No. 3. I agree also with the concluding part of the judgment of Clauson, L.J., that to the plaintiffs' *prima facie* right of action the defendants have a good defence under the Copyright Act, 1911, s. 22, which entitles them to have the appeal allowed. However, Luxmoore, L.J., disagrees on that issue. I need hardly say that I discharge my responsibility of deciding between them with diffidence, but, having listened with care to the arguments of counsel, thought over the language of the statutes, and considered both my colleagues' judgments, I find myself definitely in agreement with the conclusion of Clauson, L.J., as to sect. 22.

The issue there turns on the words of subsect. (1), which provides that " This Act shall not apply to designs " of a particular class, and that class, in spite of a double exception, is clearly defined. The first logical step is to ask to what designs the Act does apply. *Ex hypothesi*, the works to be protected are " artistic works " within sect. 1 (1). The next step is to consider whether "the design," from which sect. 22 withdraws the statutory protection, must be the whole "artistic work" so protected. Clearly not, because "copyright" is defined by sect. 1 (2) as "the sole right to produce or reproduce the work or any substantial part thereof," and sect. 2 (1) provides as follows:

A
> Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright ...

If this last provision be applied to a painting which contains two or more "substantial parts," say a conversation piece by Hogarth or Zoffany B containing two figures or groups in it, or a pen-and-ink sketch by the late E. C. Segar which contained not only a "Popeye" but also some other personality of equally ridiculous but different appearance, either of which could be extracted so as to form a "design capable of registration," clearly the copyright in that part of the picture which was C extracted to make a design would continue to attach until that part was "used or intended" for the excepted purpose just as effectively as the copyright in the other part of the picture, but, as soon as the part in question was devoted to the excepted purpose, and *a fortiori* when it was in fact multiplied, and so on, although it had previously enjoyed D the copyright protection of the 1911 Act, it would at once lose it.

In the present case, the plaintiffs, through their licensees, "reproduced a substantial part of their artistic work" in a three dimension form, the specimen doll. Apart from sect. 22, under sect. 1 (2) that specimen doll would have had the benefit of the copyright of the original pen-and-E ink sketch No. 3, and a reproduction by others without the plaintiffs' consent would have been an infringement within sect. 2 (1), (2). However, when the specimen doll was made, it was not merely a reproduction of a substantial part of the copyright sketch. It was also a "design" within the Patents and Designs Acts, 1907-1938, s. 93, and, therefore, capable F of being registered under that Act so as to come within the first provision of the Copyright Act, 1911, s. 22, and, as the plaintiffs, by their licensees, also used it and intended it to be used as a model or pattern to be multiplied by industrial processes and so on, it came within the second provision of sect. 22, and that reproduction then fell out of the protection G of the Act of 1911. For these reasons I agree with the judgment of CLAUSON, L.J. The order of the court will be as stated by him, and leave to appeal to the House of Lords will be granted.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Derick R. Martin & Co.* (for the appellants); *Shaen,* H *Roscoe & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

KNEESHAW *v.* ABERTOLLI.

[King's Bench Division (Lawrence, J.), **June 13, 1940.**]

Income Tax—Deduction against profits—Monopoly value in respect of beer and wine on-licence—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14.

The respondent, who had in the past held a beer and wine on-licence, applied for a regrant, as his existing licence was about to expire. A licence was granted to him for a period of 3 years, and the monopoly value was fixed at £75, payable in 3 annual instalments. The respondent claimed this payment of £75 as a deduction in arriving at his income tax assessment at the rate of £25 for each of the 3 years covered by the licence :—

Held : the monopoly value was a capital sum, notwithstanding that it was payable in instalments, and was not, therefore, deductible under the Income Tax Acts.

[**EDITORIAL NOTE.** There has been a number of decisions which have treated the monopoly value as a capital sum, but none of these has been concerned with income tax. It is here decided that the principle of these cases is also applicable in the case of income tax.

As to Payments in Respect of Licences, see HALSBURY, Hailsham Edn., Vol. 17, p. 131, para. 249 ; and for Cases, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-292.]

Case referred to :

(1) *Appenrodt* v. *Central Middlesex Assessment Committee,* [1937] 2 K.B. 48 ; [1937] 2 All E.R. 325 ; Digest Supp. ; 106 L.J.K.B. 690 ; 157 L.T. 201.

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Fareham in the County of Hants for the opinion of the King's Bench Division of the High Court of Justice. The respondent carried on the business of a restaurant proprietor. He had for some time past held beer and wine on-licences, which had been granted to him for limited successive periods. In 1936 he applied to the magistrates for a regrant of a beer and wine on-licence as his then existing licence expired in that year. Such a licence was granted to him for a period of 3 years and the monopoly value was fixed at £75, payable in 3 annual instalments. The respondent claimed this payment of £75 as a deduction in arriving at his income tax assessment at the rate of £25 for each of the 3 years covered by the licence. The inspector of taxes disputed the respondent's right to make this deduction on the ground that the several sums of £25 each were instalments of a capital sum. The Commissioners decided that the respondent was entitled to make the deduction claimed.

Reginald P. Hills for the appellant.

The respondent did not appear and was not represented.

Lawrence, J. : The question in this case is whether a sum of £25, an instalment of a payment for monopoly value made by the respondent, should be allowed as a deduction against the assessment in each year. The Commissioners held that it might be allowable as a deduction. The Crown contend that it ought not to be allowed as a deduction because it is, they contend, a capital payment.

The payment falls to be made under the Licensing (Consolidation) Act, 1910, s. 14, and in all the cases which have been cited to me the payment in respect of monopoly value has been held to be a payment of a capital sum, with the exception of certain observations of SCOTT, L.J., in *Appenrodt* v. *Central Middlesex Assessment Committee* (1). Both the A other judges in that case, LORD WRIGHT, M.R., and ROMER, L.J., treated the sum as being a capital sum, None of these cases has decided the point for the purposes of income tax, but, for other purposes, as I have said, in every case the courts have treated the payment of sums for monopoly value as being the payment of capital sums.

B Under the Licensing (Consolidation) Act, 1910, on the first application for an annual licence, it is the duty of the licensing justices to settle conditions for securing for the public any monopoly value, and they do that on the first application for a licence by assessing the whole monopoly value. However, the licensing justices also have powers under the Act C to grant a licence for more than one year, and, when they do that, they are authorised to assess the monopoly value for the number of years for which they are granting the licence. Then, on a fresh application for a licence thereafter, the monopoly value comes to be decided again. In either case, however, in my opinion, whether the sum arrived D at is for the entire monopoly value on the application for an annual licence or for a part of that entire monopoly value if the application is for a licence for more than one year, the sum assessed by the justices is a capital sum. It may be the whole capital sum or it may be a part of the capital sum. It makes no difference to the quality of the sum. E As has been held in all the cases, with the exception which I have stated, it is a capital sum. The fact that it is payable in instalments does not prevent those instalments from being capital for revenue purposes. In the present case, the licence was granted for 3 years, and the amount which was settled as the monopoly value was £75, payable in three annual F instalments. It is in respect of one of these three annual instalments—namely, £25—that the question here arises.

For these reasons, I am of opinion that the commissioners took the wrong view and that the sum of £25 was not deductible under the Income Tax Acts, as it was, in my judgment, a capital sum. The appeal G must, therefore, be allowed.

Appeal allowed with costs.

Solicitor: *Solicitor of Inland Revenue* (for the appellant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

H

WATSON *v.* SUTTON DISTRICT WATER CO.

[Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.), **July 15, 1940.**]

Water Supply—Domestic supply—Request to water company to turn off water—Company assenting to request and turning off tap in street outside premises—Tap turned on by third person and house flooded—Liability of water company.

The plaintiff's son requested the defendants to cut off the water supply to her house, which was then unoccupied. This they agreed to do, and subsequently notified the son that it had been done. The method adopted was to turn off a tap in the street outside the house. On returning to the house, the plaintiff found that it had been flooded and thereupon sued the defendants for damages for breach of contract in failing to turn off the water supply. It was not known who had turned on the tap and caused the flooding:—

Held: the request of the plaintiff and the assent of the defendants constituted a contract between them, whereby the defendants assumed the duty of effectively cutting off the water supply, and the defendants were liable for damage resulting from their failure to do so.

[**EDITORIAL NOTE:** It would seem to follow from this case that a water company, asked to disconnect the supply for domestic purposes, must so disconnect the supply that it cannot be restored again by any interfering person. It must be noted that the stopcock in the present case was in a position where it could be interfered with by the public, and that it was under the control both of the company and of the householder.

As to Domestic Water Supply, see HALSBURY, Hailsham Edn., Vol. 33, pp. 450-454, paras. 740-744; and for Cases, see DIGEST, Vol. 43, pp. 1078-1082, Nos. 132-166.]

Appeal by the defendants from a judgment of Lewis, J., dated May 27, 1940. The action was brought by the occupier of premises against the water undertaker who supplied the premises with water for breach of contract in failing to disconnect the supply when requested to do so, whereby the premises were damaged. The judge gave judgment for the plaintiff, stating that the point which he had to decide was whether or not it could be said that a water company, asked to cut off the water supply to a house, had carried out that order effectively if all that they had done was to turn off a tap in the public street which any passer-by could turn on again. There was no reason why the box enclosing the tap should not be locked or some method adopted for preventing tampering with the tap. In his view, the company had not carried out their mandate, and this was so even if they informed the householder that their inspector had attended and had turned off the supply.

The defendants appealed. Upon the appeal being opened, counsel for the appellants applied for the appeal to be allowed by consent, and this application was dealt with as a preliminary point.

H. J. Wallington, K.C., and *F. W. Beney* for the appellants.

Hartley Shawcross, K.C., and *H. M. Pratt* (for *Eric White* on war service) for the respondent.

Wallington, K.C., applied to the court to allow the appeal by consent without an order for costs.

MacKinnon, L.J.: Does it mean that the judgment will be set aside ?

Wallington: Yes.

du Parcq, L.J.: It used to be the practice of the Court of Appeal to refuse to allow appeals by consent. I have heard Scrutton, L.J., refuse emphatically. The reason seemed to be this. It is rather unfortunate for a judge to find that an appeal in a case which he has carefully considered has been allowed by consent without any argument being heard by the Court of Appeal. Further, it rather unsettles the law. One may read a judgment by a judge dealing with a point of law and giving a decision. One may then read that an appeal was allowed. One hardly knows whether or not the judgment stands as a statement of law. I am well aware that, before I came to this court myself, sometimes the Court of Appeal allowed appeals by consent. Speaking for myself, however, I feel that it is very unfortunate.

Luxmoore, L.J.: I agree entirely with what du Parcq, L.J., has said. I think that it is contrary to practice to allow an appeal by consent. Since I have been a member of the Court of Appeal, I have heard it said on many occasions that the only thing which the court does is to allow an appeal to be dismissed by consent, upon whatever terms the parties like to agree.

du Parcq, L.J.: That was certainly the practice of Scrutton, L.J.

Luxmoore, L.J.: That is my view.

Wallington: I would only say in this particular case that there is no question of law. It is merely a question of fact.

du Parcq, L.J.: Nevertheless, the judge decided it, and I am not prepared to say that he was wrong merely because the parties agree that the appeal shall be allowed.

Luxmoore, L.J.: Was this action only a money claim ?

Wallington: Yes.

Luxmoore, L.J.: What you are agreeing is that nothing shall be paid ?

Wallington: The result of allowing the appeal will be that the judge's judgment will be set aside, with the result that the respondent will not receive under the judgment the sum of £145 which in fact she recovered.

du Parcq, L.J.: Why cannot the appeal be dismissed ? I suppose that it is because the appellants want to be able to say to the public: "The appeal was allowed by the Court of Appeal." I suppose you want it to appear in the papers that the respondent recovered £145 by the decision of the judge, but the public should take notice that the judge was quite wrong, and that the Court of Appeal have said so, and that the appeal has been allowed. I do not think that we ought to do that.

Wallington: If your Lordship pleases.

Luxmoore, L.J.: If the appeal is dismissed by consent without costs, the judge's order with regard to costs in the court below being varied by directing that neither party shall have any costs in the court below —that is, varied by consent—then that would leave the judgment for £145 only.

Wallington : I should not be able to consent to that ; and so, my Lord, the appeal had better go on.

The appeal was then argued.

MacKinnon, L.J. : The plaintiff was the occupier and tenant of a house in Sutton. On Dec. 6, 1938, the defendant company wrote to her and said that, certain arrears of water rate not having been paid :

> I am instructed to inform you that the supply of water to your premises will be withdrawn at the expiration of 3 days, failing previous payment. . . . Under the provisions of the Waterworks Clauses Acts, the expense of cutting off the water and the costs of recovering the rate will be payable by you.

The plaintiff in fact was not in residence in the house at that time. She was in Africa. Her failure to pay the water rate was only due to inadvertence, because of her absence. Her interests in the house were being looked after by her son. When he received that notice that the water would be cut off and that the money was owing, on Dec. 8, 1938, he wrote to the defendants enclosing a cheque for the amount asked, and adding :

> I would be obliged if you would cut off the water supply to the house stated, as it is not occupied at the moment.

He did that because he himself was going abroad. At Dec. 8, 1938, he expected that there might be frost, and he thought that it was advisable not to have water and water-filled pipes in the house. The defendants replied on Dec. 9, 1938, as follows :

> I beg to acknowledge the receipt of your letter, which shall receive attention.

On Dec. 14, 1938, they wrote that the company's inspector had attended at the house and had turned off the supply, and added :

> It is necessary that I should inform you that my company can accept no responsibility for any damage that may be caused by or in consequence of defective pipes, overflows or action of frost, and I would, therefore, suggest that you arrange for a local plumber to attend and empty all pipes, tanks, etc.

That is to say, though the water was cut off, there would be full pipes in the house, and these might be affected by the frost. The plaintiff's son did not trouble to get a plumber, but he went to the house and turned the taps on, and left them running till no water emerged from them. He then thought, and thought with reason, that he had emptied all the pipes and tanks in the house, and went off to Switzerland after he had left his mother's house in a condition of safety. When he came back 3 weeks later, he went into the house, and to his dismay he found that the whole place had been flooded with water. There was 2 ft. of water in the cellar, and the kitchen ceiling was on the floor. When he went upstairs to the bathroom, he found that the pipe taking the water to the cistern had been burst by frost, and water was simply pouring out. The result of that was that the house and furniture sustained considerable damage, and the plaintiff was put to expense. The fact is that, though the defendants had turned off the tap on the stopcock which regulated the supply of water to the house, in some way that tap had been turned on again after they had turned it off on Dec. 9.

In those circumstances, the plaintiff brought this action against the defendants, upon the ground that she had asked them to cut off the supply of water and that they had failed to do so. The defendants' answer to that is: "We did cut it off in the sense that we turned off the stopcock. As a matter of fact, this stopcock, though we did not know it, is your property. It is in the street outside your house, and it is so constructed that any malevolent person coming along, provided with the necessary instrument, can open up the cover at the top of the pipe leading down to the stopcock and turn the water on again. Nobody of ours ever did turn it on again, but somebody unknown must have done so."

The resulting question in the case is whether the plaintiff can recover. The judge has held that she can, and I think that he was right. I think that one must construe the request of the plaintiff and the assent of the defendants as a contract between them, in the light of the words used and in the light of the knowledge possessed by those who used them. I do not suppose that the plaintiff or her son knew that there was this stopcock outside, still less that it was in fact the property of the plaintiff's landlord, as the freeholder of the house. When the son wrote and said "Will you please cut off the water supply?" he was using the language of the defendants themselves, who said, "If you do not pay this money, we shall cut off the water." I think that, when he asked them to cut off the water, he was entitled to assume that they would do something which would effectively cut off the water supply and make it impossible for any water to enter the house until he asked them to turn it on again. In fact, they did not do anything of the sort. They did turn off the tap, but it was a tap which to their knowledge could have been turned on again by either the plaintiff or any third person. The plaintiff certainly did not do so, and her son certainly did not do so. Nobody knows who turned it on again, but somebody did.

In those circumstances, the judge has held that the contract between the parties, constituted by the request of the plaintiff and the assent of the defendants, was to cut off the water supply—namely, to do something which would effectively prevent any water from entering through the supply pipe during the period of absence. They did not do that. The reason why they did not do it has been explained, but I think that the judge was right in holding that, upon that contract between them, the defendants did assume the duty of effectively cutting off the supply, and, as they did not effectively cut off the supply, they were liable for the resulting disaster to the house. That being so, this appeal fails, and, I think, should be dismissed.

Luxmoore, L.J.: I agree.

du Parcq, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Spencer, Gibson & Son* (for the appellants); *Reid Sharman & Co.* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

JACOBY *v.* PRISON COMMISSIONERS.

[Court of Appeal (MacKinnon, Goddard and du Parcq, L.JJ.), **July 25, 1940.**]

Public Authorities—Limitation of actions—Prisoner on remand provided with furnished cell in pursuance of contract with prison commissioners—Injury suffered through alleged defect in china chamber provided—Whether prison commissioners a public authority—Prison Act, 1877 (c. 21), *ss.* 6, 9, 39—*Public Authorities Protection Act,* 1893 (c. 61), *s.* 1—*Prison Rules,* 1933 (*S.R. & O.,* 1933, *No.* 809), *r.* 122.

The plaintiff was committed to prison on remand, and, in consideration of a sum of 12*s.* per week paid by him to the prison commissioners, was provided with a furnished cell, which contained, *inter alia,* a china chamber. While the plaintiff was using this chamber on Mar. 7, 1938, it split into a number of pieces, owing to pressure put upon it, and one of these pieces pierced the plaintiff's spine. On May 11, 1939, the plaintiff issued a writ against the prison commissioners in respect of injuries thereby suffered, and the prison commissioners raised the defence, *inter alia,* that the action was barred by reason of the provisions of the Public Authorities Protection Act, 1893. The prison commissioners are a body corporate constituted under the provisions of the Prison Act, 1877, s. 6. Sect. 39 of that Act and the rules made thereunder permit a prisoner on remand to occupy, on payment of a small sum fixed by the commissioners, a cell specially fitted and suitably furnished, and it was assumed that it was in pursuance of a contract made with the commissioners in accordance with those provisions that the plaintiff was provided with the cell and with the chamber:—

Held: the provision of the china chamber was an act done by the prison commissioners in pursuance or execution or intended execution of a public duty, and the action was, therefore, out of time and barred by reason of the Public Authorities Protection Act, 1893.

Decision of Macnaghten, J., ([1940] 2 All E.R. 499) *affirmed.*

[EDITORIAL NOTE. A person detailed on remand is, of course, in a position very different from that of a convict. The only question here is whether, in their dealings with a person on remand, the prison commissioners are able to take advantage of the protection given by the Public Authorities Protection Act, 1893, s. 1.

As to Who is a Public Authority, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-297, paras. 610-616; and for Cases, see DIGEST, Vol. 38, pp. 102-106, Nos. 732-760.]

Appeal by the plaintiff from a judgment of Macnaghten, J., dated

Apr. 17, 1940, and reported [1940] 2 All E.R. 499, where the facts are fully set out.

L. J. Solley for the appellant.

Valentine Holmes and *John Senter* for the respondents.

A MACKINNON, L.J.: This is an appeal from a judgment of MACNAGHTEN, J., upon a point of law arising on the pleadings. The plaintiff brought his action against the prison commissioners claiming on his writ damages for injuries suffered by reason of the negligence or breach of contract or warranty of the defendants, their servants or B agents. He sets out that, by the breaking of an article of furniture with which he was provided in Brixton Prison, he was injured severely and suffered damage. The injury on which he relies, and which he pleads, took place on Mar. 7, 1938. The writ was issued on May 11, 1939, some fourteen months after the accident. The defendants raised C the plea that they were protected by reason of the Public Authorities Protection Act, 1893. The Public Authorities Protection Act, 1893, s. 1, provides as follows:

> Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, D or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect, or default complained of . . .

The question is whether the act, neglect or default alleged against E the defendants was an act done in pursuance or execution or intended execution of any Act of Parliament. The Act of Parliament concerned is the Prison Act, 1877. Sect. 39 of that Act provides as follows:

> Whereas it is expedient that a clear difference shall be made between the treatment of persons unconvicted of crime and in law presumably innocent during the F period of their detention in prison for safe custody only [that is, persons on remand before their case is heard], and the treatment of prisoners who have been convicted of crime during the period of their detention in prison for the purpose of punishment, and that, in order to secure the observance of such difference there shall be in force in every place in which prisoners are confined for safe custody only, special rules regulating their confinement in such manner as to make it as little as possible oppressive, due regard only being had to their safe custody, to the necessity of preserving order and good government in the place in which they are confined, G and to the physical and moral well-being of the prisoners themselves: Therefore, be it enacted, that the Secretary of State shall make, and when made may from time to time repeal, alter, or add to, special rules . . . (3) With respect to arrangements whereby prisoners may provide themselves with articles of diet, or may be furnished with a sufficient quantity of wholesome food, and may be protected from being called upon to perform any unaccustomed tasks or offices . . .

H In pursuance of that, the Secretary of State made the Prison Rules, 1933, and r. 122 provided as follows:

> The Governor or Visiting Committee may, on the application of any prisoner awaiting trial, permit him: (1) to occupy, on payment of a small sum fixed by the Commissioners, a suitable room or cell specially fitted for such prisoners, and furnished with suitable bedding and other articles . . .

What happened was that this plaintiff was remanded and went to

Brixton Prison, where he was told by a warder that, pursuant to this arrangement, he could, if he liked, have a separate room on payment of a small sum. He asked what the small sum was, and the warder said that it was 12*s.* per week. That included a certain sum for the rent of the room and a certain sum for payment for the cleaning of the room, so that he was thereby relieved from the duty of doing that task. Then, as I say, a piece of the suitable furniture mentioned in the rule is said to have broken when the plaintiff sat upon it. It injured him, and he complains that the defendants, by negligence or breach of contract or warranty, have thereby damaged him. It is perfectly apparent to me that the defendants, the prison commissioners, in providing this room and this article of furniture, were carrying out their duties under the Prison Act, 1877, and the Prison Rules, 1933, made thereunder by the Secretary of State, and that, therefore, the judge was perfectly right in saying that, as the action was not begun until more than 6 months after the act complained of, the defendants could rely upon the Public Authorities Protection Act, 1893, which afforded a good defence. As it was a good defence, the judge, in consequence, ordered judgment to be entered for the defendants in the action as well as deciding the point of law, and in that he was obviously right. I think, therefore, that the appeal fails, and must be dismissed with costs.

GODDARD, L.J.: I agree.

DU PARCQ, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Hart Leverton & Co.* (for the appellant); *The Treasury Solicitor* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

SCOTT *v.* FRANK F. SCOTT (LONDON), LTD., AND OTHERS.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **May 21, 22, 23, June 27, 1940.**]

Companies—Shares—Restriction on transfer—Transmission—Construction of articles.

Companies—Articles of association—Rectification of mistake—Equitable jurisdiction of court to rectify documents—Whether applicable to articles of association—Companies (Consolidation) Act, 1908 (*c.* 69), *s.* 14.

Three brothers were the registered holders of all the shares in a private company. They were also the directors of the company and the signatories of the articles of association. One of the brothers died, and his widow was his sole executrix. She claimed that she was entitled to have her name entered on the register of members as holder of his shares. The surviving brothers claimed that they were entitled to acquire the shares at par, or, alternatively, rectification of the articles so as to give them that right. Art. 11 provided that no share should be transferred to a person who was not a member, and art. 18 provided that all ordinary shares of a deceased member should be offered to the principal shareholders :—

HELD : (i) upon the proper construction of the articles of association, the widow was entitled to be registered as the holder of the ordinary shares standing in the name of the deceased brother.

(ii) the court has no jurisdiction to rectify articles of association, even if it is proved that they do not accord with the intention of the signatories at the time when they were entered into.

Evans v. *Chapman* (1) *followed.*

Decision of BENNETT, J. ([1940] 1 All E.R. 392) *varied.*

[**EDITORIAL NOTE.** The first point is one of construction only. The second point raises a question which was before the court some 40 years ago but has not been tested since. The longstanding decision of JOYCE, J., is here approved by the Court of Appeal, and it is confirmed that the statutory provision for alteration ousts the ordinary jurisdiction of the court to rectify documents.

AS TO RECTIFICATION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 140-143, paras. 197-200 ; and FOR CASE, see DIGEST, Vol. 9, p. 557, No. 3691.]

Cases referred to :

(1) *Evans* v. *Chapman* (1902), 86 L.T. 381 ; 9 Digest 557, *3691.*

(2) *Re City of Glasgow Bank, Buchan's Case* (1879), 4 App. Cas. 549, 583 ; 9 Digest 202, *1252* ; *subsequent proceedings* (1880), 14 Ch.D. 628.

(3) *Heward* v. *Wheatley* (1853), 3 De G. M. & G. 628 ; 9 Digest 405, *2592* ; 22 L.J.Ch. 435 ; 21 L.T.O.S. 121.

(4) *Re Agriculturist Cattle Insurance Co., Baird's Case* (1870), 5 Ch.App. 725 ; 9 Digest 405, *2593* ; 23 L.T. 424.

(5) *Hall-Dare* v. *Hall-Dare* (1885), 31 Ch.D. 251 ; 38 Digest 723, *686* ; 55 L.J.Ch. 154 ; 54 L.T. 120.

(6) *Druiff* v. *Parker (Lord)* (1868), L.R. 5 Eq. 131 ; 35 Digest 115, *193* ; 37 L.J.Ch. 241 ; 18 L.T. 46.

(7) *Re Bowling & Welby's Contract,* [1895] 1 Ch. 663 ; 10 Digest 864, *5827* ; 64 L.J.Ch. 427 ; 72 L.T. 411.

(8) *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Assocn.,* [1915] 1 Ch. 881 ; 9 Digest 665, *4427* ; 84 L.J.Ch. 688 ; 113 L.T. 159.

APPEAL by the plaintiff from an order of BENNETT, J., dated Jan. 16, 1940, and reported [1940] 1 All E.R. 392. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J.

W. P. Spens, K.C., and *A. F. Maurice Berkeley* for the appellant.

C. E. Harman, K.C., and *E. M. Winterbotham* for the respondents.

Spens, K.C. : The Court of Appeal have held that, upon the true construction of the Liverpool company's articles, the executrix had a right to be registered. In the present case, there is in the articles one word, and one word only, which is different from the Liverpool company's articles. It was held by BENNETT, J., that he was not strictly bound by the decision of the Court of Appeal in the Liverpool company's case, and he has taken the same view as that which was held by MORTON, J., in respect of the Liverpool company's articles, which was reversed in the Court of Appeal. The decision of the court in the Liverpool company's case applies equally in the present case. [Counsel referred to *Re City of Glasgow Bank, Buchan's Case* (2), *Heward* v. *Wheatley* (3) and *Re Agriculturist Cattle Insurance Co., Baird's Case* (4).]

Harman, K.C.: The company's articles were signed on Oct. 5, 1926, and that is the instrument which must be rectified. The document was not the document the parties intended it to be. It was not the document which the personal respondents intended to execute. The brothers are not getting that for which they sold their business. Somebody else is getting something which he ought not to have. The reason is that the court is saying that it cannot rectify the articles. In *Hall-Dare* v. *Hall-Dare* (5), a limitation intended to be to the younger son was, by mistake, made to the elder, and the court ordered rectification. In *Druiff* v. *Parker (Lord)* (6), the court held that it had jurisdiction to rectify a bill of exchange. The jurisdiction of the court to rectify extends to all documents. [Counsel referred to *Re Bowling & Welby's Contract* (7).]

Spens, K.C., in reply: If the alleged mutual mistake had been the negligent inclusion or exclusion of a clause of Table A, and the court were asked to rectify, there might be an argument that the Companies Act, 1929, s. 382 (4), might apply. If Table A has in fact been adopted as the articles, those remain the articles, and the only way in which they may be altered is by alteration by the Board of Trade before the company comes into existence. The subsection deals with potential alteration of articles of association. If the Board of Trade alters the standard form, and publishes the form, and Table A is subsequently adopted, it is adopted in its altered form. The articles of existing companies, however, are not affected. In an action for rectification, the intention is to bring a written document into conformity with the intention of some person or persons. The subscribers to a memorandum of association are frequently clerks, who are nominees. They are not the real promoters. Where must one find the intention in such a case, in order to rectify the document? There can be no rectification of articles of association after registration. Under the guise of rectification, the court is being asked to alter registered articles which form the public registered charter of a legal person. [Counsel referred to *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Assocn.* (8).]

Luxmoore, L.J. [delivering the judgment of the court]: On Mar. 14, 1939, the plaintiff, who is the widow and sole executrix of the will of Frank Stanley Scott, instituted this action against a private company incorporated under the Companies Acts, 1908 to 1917, with the name of Frank F. Scott (London), Ltd., and her two brothers-in-law, Stuart Arthur Scott and Reginald Scott. The relief claimed was a declaration that, upon the true construction of the articles of association of the company, and in the events which have happened, the plaintiff is entitled to be placed upon the company's register of members in respect of 100 ordinary shares in the company which were registered in the name of her husband at his death. The plaintiff further claimed to have the company's register of members rectified by the insertion therein of her name as the holder of the shares in question, and claimed certain other relief to which it is immaterial to refer. The defendants challenged the plaintiff's right to be registered as the holder of the shares, and claimed that, on the true construction of the articles of association, the plaintiff, as the executrix of Frank Stanley Scott, was bound to offer those shares to the defendants, Stuart Arthur Scott and Reginald Scott. The defendants also asserted that, if, contrary to their contention, the court should hold that, on the true construction of the articles of association, the plaintiff was not bound to offer the shares in question to the two personal defendants, they were entitled to have the articles of association of the company rectified so as to provide in effect that all ordinary shares of a deceased member should be offered by his executors or administrators forthwith after his death to the principal shareholders—namely, in the existing circumstances, the personal defendants. The defendants counterclaimed for a declaration in accordance with the construction for which they contended, and for rectification of the articles of association in the manner indicated if the court should not accept their contention as to construction. The action was heard by BENNETT, J., and was dismissed, the judge making a declaration on the counterclaim in accordance with the contention of the defendants on construction. He also considered the question whether or not, had he decided otherwise as to the construction of the articles, he could have made an order for rectification, and he held that the court had no jurisdiction so to do, even assuming that the articles of association were not in accordance with the proved intention of the two personal defendants and Frank Stanley Scott at the time when the articles were signed by them. He ordered the plaintiff to pay the defendants their costs of the action and one-quarter of their costs of the counterclaim. The plaintiff appeals to this court from the order of BENNETT, J., and the defendants have given notice of cross-appeal from the decision of BENNETT, J., on the question of rectification in the event of this court being of a contrary opinion to that expressed by him on the question of construction. It is necessary, therefore, to determine first whether the judgment of BENNETT, J., on the question of construction is correct.

There is no dispute of fact. All that is necessary to be stated with regard to the first question is that the company was incorporated on Oct. 12, 1926, as a private company under the Companies Acts, 1908 to 1917. Its share capital was and is £10,500, divided into 10,200 preference shares of £1 each and 300 ordinary shares of £1 each. The rights attached to the preference shares are set out in the memorandum of association. Nothing turns on these rights, and there is no need to refer to them, beyond stating that the preference shares carry the right to (i) a fixed cumulative preferential dividend at such a rate as shall, after deduction of income tax at the rate for the time being in force, yield a clear £15 net per cent. per annum on the capital for the time being paid up on those shares, and (ii) priority in a winding up in respect

of return of capital and payment off of arrears of preferential dividend as mentioned in the memorandum, but no further right to participate in profits or assets. The company was formed to take over the business of shipping butchers carried on in partnership in London by the two individual defendants and the late Frank Stanley Scott. These three were brothers. The company adopted as its articles of association A
Table A in the Companies (Consolidation) Act, 1908, Sched. I, with certain modifications. These modifications are to be found in printed articles of association attached to the company's memorandum of association. The whole of the share capital was issued, each of the three brothers being allotted 3,400 preference shares and 100 ordinary B
shares. By the articles of association, the control of the company was committed to the holders of the ordinary shares, the preference shares conferring only limited voting rights at any general meeting of the company.

Frank Stanley Scott died on Sept. 10, 1937, and, under the terms of C
his will, the plaintiff, who was his widow and sole executrix, became entitled to the 3,400 preference shares and the 100 ordinary shares of the company which were standing in the name of Frank Stanley Scott at his death. In due course, the plaintiff claimed to be placed on the company's register of members in respect of the 3,400 preference shares and the D
100 ordinary shares. Her right to be registered in respect of the preference shares has never been questioned, but, as already stated, the two personal defendants claimed that, under the articles of association, the plaintiff is bound to offer to them the 100 ordinary shares, and that they have the right to acquire them at par, although we understand that an E
offer to pay a price considerably in advance of the par nominal value of the 100 ordinary shares in question was made. The correctness or otherwise of this claim depends solely upon the true construction of the company's articles of association. The articles adopt Table A of the 1908 Act, with the exclusion of certain clauses. Among those excluded F
is Table A, cl. 22. The articles material to be considered are Table A, cll. 21, 23, and cll. 11-19, inclusive, of the company's articles of association. Table A, cl. 21, provides that the executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share—that is, the G
share registered in the name of the deceased shareholder. Table A, cl. 23, so far as material, provides that a person becoming entitled to a share by reason of the death of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being H
registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company. It is to be observed that Table A, cl. 22, which is excluded by art. 1 of the company's articles of association, confers an option upon a person becoming entitled to a share in consequence of the

death of a member either to be registered as a member in respect of that share or, instead of being registered himself, to make such transfer of the share as the deceased person could have made, subject to certain specified rights of the directors to which there is no need to refer. The company's articles of association contain no express equivalent to the rights conferred by the excluded Table A, cl. 22. Indeed, the articles contained in cll. 11-19 of the company's articles contain no direct provision for transmission as opposed to transfer. The most material of these clauses is cl. 19. It starts with the statement that Table A, cl. 22, which had already been excluded, shall not apply, and continues :

> . . . without prejudice to the provisions of cl. 18 hereof any person who shall have become entitled to a share in consequence of the death . . . of any member may, if he shall not be registered as a member as provided by cl. 21 of Table A, transfer the same in manner provided by and subject to the conditions contained in cll. 11-16 inclusive of these articles.

It is to be observed that the draftsman seems to have thought that the executor of a deceased person derives a right to be registered as a member from Table A, cl. 21. The material point, however, is that cl. 19 contemplates the possibility of the registration as a member of the company of the person becoming entitled to any shares, whether preference or ordinary, of which a deceased person was the registered holder. Clause 18 of the articles of association provides as follows :

> Any preference share of a deceased member may be transferred by his executors or administrators to any son, daughter, grandson, granddaughter, or other issue nephew, niece, son-in-law, widow or widower of such deceased member (to whom such deceased member may have specifically bequeathed the same) and preference shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustee for the time being of such will, and cl. 20 hereof shall not apply to any transfer authorised by this clause, but all ordinary shares of a deceased member shall be offered to the principal shareholders pursuant to the provisions of cll. 12 and 13 hereof.

This clause provides for the transfer of preference shares of a deceased member to certain relatives of the deceased member, provided that there is a specific bequest to the particular relative. It is difficult to appreciate with what object the last sentence of the clause was inserted. It is introduced by the conjunction " but," as if it were intended to provide some exception to what has preceded it, but, as the preceding part of the clause is confined to " preference " shares and the last sentence relates only to ordinary shares, this was obviously not its object. It was argued on behalf of the defendants that it must be construed as an imperative direction that all ordinary shares held by a deceased member should be offered forthwith after the death of that member to the principal shareholders. The offer referred to is to be pursuant to the provisions of cll. 12 and 13 of the company's articles of association. A consideration of these two articles, in our judgment, affords the clue to the meaning of the sentence under consideration. Clause 12 provides as follows :

> Any member or other person entitled [including the executors of a deceased member] and proposing to transfer any shares . . . shall give notice in writing

> (hereinafter called " the transfer notice ") to the company that he desires to transfer the same . . .

Then follow certain directions for ascertaining the purchase price. The transfer notice, when given, is to constitute the company the agent of the proposing transferor for the sale of the shares at the price so ascertained. Clause 13 provides how shares comprised in a transfer notice are to be offered for sale. Plainly, the company, and not the proposing transferor, is to make the offer, which, in the first instance, is to be made, whether the shares be preference or ordinary, to " the principal shareholders," a description which is defined by cl. 10 as meaning those members who respectively hold at least 20 per cent. of the issued ordinary share capital of the company. From these two clauses, it seems reasonably clear that the reference to the offer of ordinary shares at the end of cl. 18 is to an offer of those shares by the company. The company cannot make any offer unless and until it receives a notice that the person entitled to a deceased member's shares " proposes to transfer such shares," and, consequently, if no such notice has been given, the company cannot make any offer. We are unable to find any provision in the company's articles of association which compels a person entitled to a deceased member's shares to give the company a transfer notice, and, in the absence of such a provision, the matter seems to be left to the discretion of the person entitled to a deceased member's shares whether or not he will give such a notice. If that person decides not to give such a notice, there is nothing to take away his or her right to retain the interest in the shares of the deceased member, even though they be ordinary shares.

Reliance was placed by the appellant, both before Bennett, J., and in this court, upon a decision of this court (constituted by Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.) in an unreported case relating to the right of the executrix of a deceased member of a company incorporated under the name of Frank F. Scott (Liverpool), Ltd., closely associated with the company. This company is hereinafter referred to as the Liverpool company. Such right arose under articles of association which, so far as the material clauses are concerned, were identical, with the exception of one word, with the material articles under consideration in the present case, in that Table A of the 1908 Act was adopted with modifications which excluded Table A, cl. 22, but included Table A, cll. 21, 23, and modifications set out in cll. 10-20 inclusive, identical except for one word with clauses bearing the same numbers in the articles of association of the company. The exception referred to is the presence in cl. 18 of the company's articles of association of the word " preference " before the word " shares " in the following sentence in cl. 18 of the Liverpool company's articles of association :

> . . . and shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustee for the time being of such will.

In the Liverpool case, the court held that the executrix of a deceased holder of ordinary shares could not be compelled to transfer those shares, but was, if she so desired, entitled to be registered as the holder thereof. It is true that SIR WILFRID GREENE, M.R. in his judgment in the Liverpool case, in which the other members of the court concurred, laid stress on the fact that, in the sentence quoted, the word "shares" in cl. 18 must mean ordinary or preference shares "standing in the name of trustees of the will," an argument which is not available in the present case by reason of the limitation caused by the presence of the word "preference," but this was only one of a number of considerations, and was not, in our opinion, of such primary importance as to justify the statement made by BENNETT, J., in his judgment in the present case that the words of the articles to be constructed are "wholly different" from those in the Liverpool case, and that, therefore, he was not bound by that decision. In our judgment, the decision covers the present case, and ought to have been followed by BENNETT, J. In addition to the reasons relied upon by the Court of Appeal in that case, an additional reason is to be found in the presence in cl. 18 of the company's articles of association of the words:

> . . . all ordinary shares of a deceased member shall be offered to the principal shareholders pursuant to the provisions of cll. 12 and 13 hereof.

The word "offered" must, in our judgment, be construed as referring to an offer by the company under a transfer notice given to the company by the person entitled thereto—namely, the executrix—as the proposing transferor in accordance with the provisions of cll. 12 and 13. No such notice was given, and the plaintiff consequently remains the person entitled to the shares. We are satisfied that the plaintiff is entitled to a declaration that, upon the true construction of the articles of association of the company, and in the events which have happened, the plaintiff is now entitled to the 100 ordinary shares of which Frank Stanley Scott was the registered holder at his death.

The next question which falls to be considered is whether the defendants are entitled to have the articles of association rectified in the manner claimed by them. BENNETT, J., said that he was prepared to hold that the articles of association as registered were not in accordance with the intention of the three brothers, who were the only signatories of the memorandum and articles of association, and, down to the date of Frank Stanley Scott's death, the only shareholders therein. BENNETT, J., held, however, that the court has no jurisdiction to rectify articles of association of a company, even if they do not accord with what is proved to have been the concurrent intention of all the signatories therein at the moment of signature. We are in complete agreement with this decision. It seems to us that there is no room in the case of a company incorporated under the appropriate statute or statutes for the application to either the memorandum or articles of association of the principles upon which a Court of Equity permits rectification of documents, whether *inter partes* or not. The memorandum and articles of association of any company which it is proposed to incorporate must be signed by the requisite number of persons who desire its incorporation, and must comply with the statutory requirements in respect of registration. In the present case, the material statute is the 1908 Act. These requirements are (i) the delivery of the memorandum and articles to the registrar of companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situated, (ii) the retention of such memorandum and articles by the registrar, and (iii) the registration of those documents: see sect. 15 of the 1908 Act. It is not until all these requirements have been satisfied that the company comes into being, the certificate of its incorporation is issued, and the memorandum and articles become binding upon the company and its members as provided by the Companies (Consolidation) Act, 1908, ss. 14, 16. The 1908 Act contains powers of alteration and extension of the memorandum and articles, but these are no longer applicable, for the Act has been wholly repealed by the Companies Act, 1929, save that the incorporation of any company under the former Act is saved by sect. 381 of the 1929 Act. The powers to alter and extend are purely statutory, and there is no hint in the 1929 Act of any power to rectify, and this applies also to the 1908 Act. It is quite true that, in the case of the rectification of a document, such as a deed *inter partes*, or a deed poll, the order for rectification does not order an alteration of the document, but merely directs that it be made to accord with the form in which it ought originally to have been executed. This cannot be the case with regard to the memorandum and articles of association of a company, for it is the document in its actual form which is delivered to the registrar and is retained and registered by him, and it is that form, and no other, which constitutes the charter of the company and becomes binding on it and its members. The legal entity only comes into existence as a corporate body distinct from the subscribers to the memorandum and articles registered upon registration: see the Companies (Consolidation) Act, 1908, ss. 14, 15, 16, 17, and the Companies Act, 1929, ss. 12, 13, 15, 20. In all cases, any change in the name or constitution of the company must be registered with the registrar. In some cases, the alteration is not effective until it is registered—for example, in the case of the change of name of a company (sect. 19 of the 1929 Act), or in the case of a reduction of capital (sects. 55 and 58 of the 1929 Act)—while in other cases the failure to register is made an offence punishable by fine, which may amount to a very large sum, having regard to the fact that it may be fixed by reference to each day during which the failure to register continues—for example, (*a*) any alteration in the share capital of a company (sects. 50 and 51 of the 1929 Act), (*b*) any variations in shareholders' rights (sect. 61 of the 1929 Act), and (*c*) resolutions altering the articles of association of a company (sects. 10 and 118 of the 1929 Act). Further, the effect of registration of the memorandum and articles of a company under sect. 14 of the 1929 Act is to bind the company (which, as already stated, only comes into

existence after the registration is effected) and the members thereof to the same extent and in the same manner as if they had respectively been signed and sealed by each member and contained covenants on the part of each member, his heirs, executors and administrators to observe all the provisions of the memorandum and of the articles, subject to the
A provisions of the Act. It seems plain that this section does not admit of any rectification of the memorandum and articles, apart from alterations under the express powers of the Act, for the only contract is a statutory contract in which the company is included by reference to the registered documents, and to no other documents. Further, as
B BENNETT, J., pointed out, there is no machinery either in the 1908 Act or in the 1929 Act for compelling the registrar to register any rectification of the memorandum or articles if the court should think fit to make such an order.

It is not without significance that, during the whole of the long period
C during which it has been competent to incorporate joint stock companies under general statutes, there has been only one case in which the question has been raised whether the memorandum or articles of such a company can be rectified by the court, namely, *Evans* v. *Chapman* (1). This case came before JOYCE, J., on a motion in an action to rectify the articles of
D association. It was apparently admitted on the motion that the mistake sought to be rectified was solely due to a clerical error. The nature of the interlocutory relief sought is not stated in the report. JOYCE, J., said, at p. 382 :

> I do not see my way to make the order asked for. No doubt a blunder was made
> E in drafting the articles, but that can be rectified under the provisions of the Companies Act, 1862, s. 50, and is the proper way of doing it [that is, by passing a special resolution to alter the articles]. With reference to the jurisdiction to rectify such a document, counsel have not had much time or opportunity to look into the authorities on the subject ; but on the materials before me and as at present advised, I am of opinion that the general jurisdiction of the court to rectify instruments has no application to a document of this kind, which has only a
> F statutory effect, and can only be rectified by statutory authority.

As all parties to the action appear to have supported the claim to rectification, it is probable that the judge's suggestion to proceed by special resolution was followed, for the action does not appear to have gone to trial on the question of rectification. For these reasons, as
G well as for those relied upon by BENNETT, J., we think that the claim to rectify the articles must be rejected. During the argument, it was urged by counsel for the defendants that considerable hardship might result unless a power to rectify existed, and to support this view he postulated a hypothetical case in which the articles of a company
H provided by mistake that the preference shares should carry a fixed dividend of 70 per cent. instead of 7 per cent., the "0" having been inserted owing to a clerical error, and the shareholders who controlled more than one-fourth of the voting power opposed the passing of any special resolution to rectify the mistake. It was argued that in such a case the hardship on the ordinary shareholders must be capable of

remedy by rectification. We think that the short answer to such a case is that the proper remedy is to petition the court for an order for the compulsory winding up of the company, on the ground that, in the circumstances, it is just and equitable so to do. We respectfully agree with the refusal of Bennett, J., to make any order for rectification.

There remains the question whether or not the plaintiff can insist A
on having her name registered as the holder of the ordinary shares
standing in her husband's name at his death. It is true that the option
conferred by Table A, cl. 22, of the 1908 Act is not available, but the
Court of Appeal has already held in the case of the Liverpool company
that a person entitled to the ordinary shares registered in the name of B
a deceased member is entitled, by necessary implication to be found
in its articles of association, to be so registered, notwithstanding the
express exclusion of Table A, cl. 22, and the absence therein of any
clause conferring in express terms the like option. In our judgment,
if one has regard to the similarity of the material articles in the two C
cases, the decision in the Liverpool case covers the present, and this
court is bound to follow it. Apart from this, however, it seems to us
on general principles that, where, as in the present case, an executrix
has the legal right to the shares of which the deceased testator was the
registered holder, in the absence of any power of veto conferred on D
the company by its articles of association, she is entitled to have her
name entered on the register if she so desires as ancillary to her legal
title to the shares in question: *Re City of Glasgow Bank, Buchan's Case* (2),
per Lord Selborne, at p. 588, and *Howard* v. *Wheatley* (3), *per*
Turner, L.J., at p. 646. It follows that, in our opinion, the plaintiff E
is entitled to an order rectifying the company's register of members
by inserting the plaintiff's name therein as the holder of the 100 ordinary
shares which are still standing in the name of her late husband. In the
result, the plaintiff's appeal must be allowed and the defendants' cross-
appeal dismissed. The personal defendants must pay the plaintiff's costs F
of the appeal. The order of the judge dismissing the action must
be discharged, and the appropriate relief must be given in accordance
with this judgment. So far as the counterclaim is concerned, it must
be dismissed, and the plaintiff is entitled to an order that the whole of
her costs of the action and of the counterclaim in the court below be G
paid by the personal defendants. The defendant Reginald Scott must
pay the plaintiff's costs of the cross-appeal.

Solicitors: *Field, Roscoe & Co.*, agents for *Guy Williams & Co.*, Liverpool (for the appellant); *Layton & Co.* (for the respondents).

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[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re SMITH-BOSANQUET, SMITH *v.* SMITH-BOSANQUET.

[CHANCERY D N (Bennett, J.), **July 2, 3, 1940.]**

Distinguished. *Re* KEELE ESTATES.
[1952] 2 All E.R. 164.

ionment of duty—Property passing under appointment—Appointment of sum free of all deductions except income tax and sur-tax.

Powers—Exercise—Excessive exercise—Power to appoint part of income not exceeding in the whole a stated annual sum—Whether appointment of that sum free of duty an excessive exercise of power.

By his will, dated June 30, 1905, the testator settled his residuary estate upon his son for life, and by cl. 26 he gave the son a power to appoint out of the income of such residuary trust in favour of any widow he might leave "not exceeding in the whole the annual sum of £2,000." The son died leaving a widow and one infant son, having by his will appointed to the widow "during the residue of her life the yearly sum of £2,000 free of all deductions (except income tax and sur-tax) to be charged upon and payable out of the income of the residuary personal estate bequeathed by the will of" the testator. The present summons was issued to determine whether, upon the true construction of the will, the widow was entitled to a clear annual sum of £2,000 payable out of the residuary personal estate, or whether she was entitled to such an annuity only after contributing under the Finance Act, 1894, s. 14, a proportionate part of the estate duty due on the death of the son, the tenant for life. It was contended on behalf of the infant son of the tenant for life that the words "free of all deductions" were in excess of the power given by the original testator, and should be disregarded:—

HELD: the widow was entitled to a clear sum of £2,000 per annum, and was not liable to contribute a proportionate part of the estate duty, but the appointment was not in excess of the power as it did not charge the income of the residuary trust fund with an annual sum greater than £2,000.

[EDITORIAL NOTE. It is held that, in considering whether the power of appointment has been rightly exercised, only the amount which will be payable out of the income of the fund is to be considered. It is immaterial that the terms of the appointment also necessitate the payment from the fund of a capital sum in respect of death duties. So long as no more than the stated sum has been taken from the income, there is no excessive exercise of the power.

AS TO APPORTIONMENT OF ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 293-296, para. 309; and FOR CASES, see DIGEST, Vol. 21, pp. 40, 41, Nos. 255-260.]

Cases referred to: .

(1) *Re Drake, Drake* v. *Wilson*, [1926] Ch. 559; Digest Supp.; 95 L.J.Ch. 386; 134 L.T. 362.

(2) *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643; 21 Digest 41, *261*; 67 L.J.Ch. 682; 79 L.T. 403.

(3) *Re Coxwell's Trusts, Kinloch-Cooke* v. *Public Trustee*, [1910] 1 Ch. 63; 21 Digest 41, *259*; 79 L.J.Ch. 62; 101 L.T. 627.

(4) *Re Palmer, Palmer* v. *Palmer*, [1916] 2 Ch. 391; 21 Digest 35, *220*; 85 L.J.Ch. 577; 115 L.T. 57.

(5) *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457; 21 Digest 43, *275*; 71 L.J.Ch. 289; 86 L.T. 183.

(6) *Re Maryon-Wilson, Wilson* v. *Maryon-Wilson*, [1900] 1 Ch. 565; 21 Digest 47, *307*; 69 L.J.Ch. 310; 82 L.T. 171.

(7) *Re Portman (Viscount) (No. 2)*, [1925] Ch. 294; Digest Supp.; 94 L.J.Ch. 329; 133 L.T. 389.

(8) *Re Tattersall's Settlement, Public Trustee* v. *Tattersall*, [1918] 2 Ch. 243; 21 Digest 39, 251; 87 L.J.Ch. 521; 119 L.T. 70.

Summons to determine whether, upon the true construction of the will of George Richard Bosanquet Smith-Bosanquet, his widow, Ethelind Minnie Smith-Bosanquet, was entitled under a power of appointment made in her favour to a clear annuity of £2,000 payable out of, and charged upon, the income of the residuary personal estate, or whether she was entitled to such annuity after payment thereout of a proper A
proportion of estate duty payable on the residuary personal estate on the death of the testator. The facts are fully set out in the judgment.

Lindsay M. Jopling for the plaintiffs, the trustees.

H. B. Vaisey, K.C., and *F. C. Watmough* for the first defendant, the widow of the tenant for life. B

W. P. Spens, K.C., and *J. Leonard Stone* for the second defendant, the infant son of the tenant for life.

Jopling stated the facts.

Vaisey, K.C.: This sum of £2,000 is not a jointure arising on the death of the tenant for life. It is a sum charged on the estate. The C
general principle is set out in Dymond on Death Duties, 7th Edn., p. 232. The Finance Act, 1894, does not provide for two recoupments. There is no doubt that the appointor intended the widow to have a clear £2,000, and the power in the original testator's will amounts to a power to direct up to £2,000 to be charged on the income of the residuary D
personal estate, and the appointment is not, therefore, excessive. [Counsel referred to *Re Drake, Drake* v. *Wilson* (1), *Re Parker-Jervis, Salt* v. *Locker* (2), *Re Coxwell's Trusts, Kinloch-Cooke* v. *Public Trustee* (3) and *Re Palmer, Palmer* v. *Palmer* (4).]

Spens, K.C.: A power to charge £2,000 out of income is not the same E
as a power to charge £2,000 clear of all deductions, and the appointment to the widow gives her £2,000 free of payment of estate duty. In effect, that is giving her more than £2,000 and is not within the terms of the power. Where a person becomes, on the death of any person, entitled to any property, that first person is liable for his share of estate duty F
under the Finance Act, 1894, s. 14, unless there is an express provision to the contrary. The appointor's direction that the £2,000 should be clear of all deductions amounts to such a direction. It is not allowed by the power, and it is excessive. [Counsel referred to *Re Chisholm, Goddard* v. *Brodie* (5), *Re Maryon-Wilson, Wilson* v. *Maryon-Wilson* (6), G
Re Coxwell's Trusts, Kinloch-Cooke v. *Public Trustee* (3), *Re Portman (Viscount) (No. 2)* (7), *Re Drake, Drake* v. *Wilson* (1), and *Re Tattersall's Settlement, Public Trustee* v. *Tattersall* (8).]

Bennett, J.: I think that the question raised by the summons H
depends upon the terms of a power contained in the will of Horace James Smith-Bosanquet, who died on Mar. 28, 1907. By cl. 22 of his will, he bequeathed all his personal estate not thereby or by any codicil otherwise specifically disposed of to his trustees upon the usual administrative trusts, and by cl. 25 he declared that his trustees should stand possessed

of the investments thereinbefore directed to be made or authorised to be retained (thereinafter called his residuary trust fund) and the annual income thereof upon the like trusts and with and subject to the like powers and provisions in all respects as if the same were capital money or investments of capital money arising under the Settled Land Acts, 1882 to 1890, from his residuary real estate thereby settled. His real estate was settled to uses under which his son, the late George Richard Bosanquet Smith-Bosanquet, was tenant for life without impeachment of waste and from and after his death to the use of his first and other sons severally and successively according to seniority in tail general. By cl. 26 of his will, the testator provided as follows:

> I declare that my said son [George Richard Bosanquet Smith-Bosanquet] may from time to time or at any time by deed revocable or irrevocable or by will or codicil appoint to or for the benefit of any widow he may leave him surviving during the residue of her life or any less period and subject to such conditions and such discretions exercisable by my trustees or by any other person or persons any part or parts of the income of my residuary trust fund not exceeding in the whole the annual sum of £2,000 such annual sum to be payable at such times and in such manner as my said son shall think fit.

George Richard Bosanquet Smith-Bosanquet made his will on Aug. 24, 1934. He had one son, the infant defendant George Andrew Smith-Bosanquet, and he left a widow, the first defendant. By his will, in exercise of the power conferred upon him by the will of the testator, he appointed to his widow, if she should survive him, during the residue of her life the yearly sum of £2,000 free of all deductions except income tax and sur-tax, to be charged upon and payable out of the income of the residuary personal estate.

The question is whether, upon the true construction of the will, the widow is entitled, under the appointment made in her favour, to a clear annuity of £2,000 payable out of, and charged upon, the income of the residuary personal estate, or whether she is entitled to such annuity after payment thereout of a proper proportion of the estate duty payable in respect of the residuary personal estate on the death of George Richard Bosanquet Smith-Bosanquet, her husband, who appointed in her favour. The residuary trust fund upon the income of which the annuity was charged was worth approximately £280,000-odd at the date of George Richard Bosanquet Smith-Bosanquet's death, and the estate duty was at the rate of 32 per cent. It is said that the widow is chargeable with estate duty or a rateable proportion of estate duty under the Finance Act, 1894, s. 14 (1), which provides as follows:

> In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary.

The case of the infant defendant is put in this way. The appointment made in favour of the widow is an appointment of the yearly sum of £2,000 free of all deductions except income tax and sur-tax. The words "free of all deductions" amount to an express provision to the contrary within the meaning of the Finance Act, 1894, s. 14 (1), and exonerate the appointee from the liability for estate duty or the rateable proportion of the estate duty which would be recoverable from her under the provisions of sect. 14 (1) if the words had not been in the appointment. The argument is that, because those words are included, and because the appointor's widow is exonerated from estate duty, therefore the appointor, the donee of the power, has made an exercise of the power which is in excess of the authority which its terms conferred upon him. The argument is that, unless in the power there are words expressly enabling the donee of it to make an appointment free of all deductions, an appointment so made is not warranted by the terms of the power. I do not accept the argument. It seems to me that, as long as the appointment made in exercise of the power does not charge the income of the residuary trust fund with a greater annual sum than £2,000, the appointment is within the terms of the power, and the appointment which the donee of the power has made does not have the effect of charging the annual income of the residuary trust fund with a greater sum annually than £2,000. The widow gets no more than £2,000 out of the income of the residuary trust fund. It is true that she is absolved from the liability, which otherwise might be imposed upon her, of having to pay a proper rateable part of the estate duty leviable when her husband died upon the residuary trust fund under the testator's will, but, in my judgment, that does not exceed the authority which is conferred upon the donee of the power by the terms of the testator's will. I think, therefore, that the answer to the question raised is that the widow is entitled, upon the true construction of the will, under the appointment made in her favour to a clear annuity of £2,000 payable out of, and charged upon, the income of the residuary personal estate, without any liability to contribute towards estate duty payable on the death of George Richard Bosanquet Smith-Bosanquet. The costs of all parties as between solicitor and client will be paid out of the residuary fund.

Solicitors: *Trower, Still & Keeling* (for the plaintiffs); *Emmet & Co.* (for the defendants).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

METROPOLIS ESTATES CO., LTD. *v.* WILDE.

[Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Tucker, J.), **July 4, 5, 15, 1940.**]

Bankruptcy—Order of discharge—Effect of order—Release of debts—Rent—Future rent due after date of proof—Disclaimer—Bankruptcy Act, 1914 (*c.* 59), *s.* 54—*Bankruptcy Rules,* 1915, *r.* 276.

The plaintiffs granted a lease of a flat to the defendant and a company as joint tenants for a term of 7 years from Dec. 25, 1935. The rent was payable quarterly in advance. On Jan. 9, 1936, a receiving order was made against the defendant on a petition presented before the commencement of the lease, and on the following day the defendant was adjudicated bankrupt. On June 30, 1936, he obtained his discharge, subject to a suspension for 12 months. He did not disclose his interest under the lease to his trustee in bankruptcy, and no steps were taken to disclaim that interest. In Oct., 1939, the present action was brought against the defendant claiming one quarter's rent due in advance in A Sept., 1939. The defendant contended that rent due under the lease subsequent to his adjudication was a debt provable in his bankruptcy, and that he had been released from all liability by his discharge:—

HELD: as the plaintiffs could only prove in the bankruptcy for arrears of rent due at the time of proof, the liability of the defendant in respect of future rent under the lease remained, and the plaintiffs were entitled to recover the rent claimed. B

[**EDITORIAL NOTE.** In general, the effect of a discharge from bankruptcy is to release the debtor from his debts. This, however, is qualified by the fact that the debts must be provable in the bankruptcy. In the case of rent, proof can be lodged only in respect of arrears of rent due at the time of the proof, and it follows, therefore, that future rent is not a provable debt and is not released by the discharge of the bankrupt. C

AS TO WHAT DEBTS ARE DISCHARGED, see HALSBURY, Hailsham Edn., Vol. 2, pp. 352-354, paras. 476, 477; and FOR CASES, see DIGEST, Vol. 4, pp. 580-587, Nos. 5325-5372.]

Cases referred to:

D (1) *Hopkinson* v. *Lovering* (1883), 11 Q.B.D. 92; 5 Digest 953, *7807*; 52 L.J.Q.B. 391.

(2) *Re New Oriental Bank Corpn.* (*No. 2*), [1895] 1 Ch. 753; 10 Digest 935, *6413*; 64 L.J.Ch. 439; *sub nom. Re New Oriental Bank Corpn., Ltd., Ex p. Hong Kong Land Investment & Agency Co., Ltd.*, 72 L.T. 419.

(3) *Ponsford* v. *Abbott* (1884), 1 Cab. & El. 225; 5 Digest 1187, *9584*.

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APPEAL by the defendant from a judgment of the Common Serjeant, His Honour JUDGE WHITELEY, K.C., delivered on May 22, 1940, at the Mayor's and City of London Court. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J. The Common F Serjeant held, on the authorities, that, where a lease is existing and has not been disclaimed, a lessor cannot prove in the lessee's bankruptcy for rent which has not yet become due and payable: HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 2, pp. 264, 265, para. 343, and *Re New Oriental Bank Corpn.* (*No. 2*) (2). Therefore, as the rent claimed G became due after the discharge but before the disclaimer, and as it was a debt which could not have been provable in the bankruptcy, the plaintiffs had a good cause of action to recover it from the defendant, as the effect of the discharge was to release the bankrupt only from all debts provable in bankruptcy: HALSBURY'S LAWS OF ENGLAND, H Hailsham Edn., Vol. 2, pp. 352, 353, para. 476, and the Bankruptcy Act, 1914, s. 28 (2). A disclaimer by the trustee determines as from the date of the disclaimer the liabilities of the bankrupt in respect of the property disclaimed: sect. 54 (2). If the liabilities are those accruing after the date of the disclaimer, the section can be no answer to the present claim, as the defendant's interest was not disclaimed until

Feb. 2, 1940. Although on his bankruptcy the defendant's interest in the lease vested in the trustee, the defendant, being the original covenantor, still remained liable on his covenant unless and until he was discharged. The Common Serjeant was satisfied that the defendant continued in personal occupation of the premises to the end of Sept., 1939, and did not occupy the premises in any other capacity, such as in that of a servant of the company. The fact that the company was a joint tenant with him did not alter his position or distinguish the case from *Ponsford* v. *Abbott* (3). It was unnecessary, therefore, for the Common Serjeant to decide whether or not the defendant was legally obliged to disclose his financial position to the plaintiffs. He gave judgment for the plaintiffs with costs, and the defendant appealed.

I. H. Jacob for the appellant.

Patrick A. Devlin for the respondents.

Jacob: The petition was advertised and gazetted, and so the whole world, including the respondents, had notice of it. There is no evidence that the appellant did any wrong. This was a debt provable in bankruptcy: Bankruptcy Act, 1914, s. 30 (3). On his bankruptcy, the appellant's property in the lease became vested in his trustee. There is no authority for the retransfer of the property in the lease from the trustee to the bankrupt after his discharge. On Sept. 29, 1939, the company was in sole occupation, and had the right to the exclusive possession of the premises. *Ponsford* v. *Abbott* (3) must be distinguished.

Devlin: The appellant was under a duty to disclose his interest in the lease to the trustee, and he failed to do so. The claim was not a debt provable in the bankruptcy, but, even if it had been so, the respondents were hindered from proving it by the appellant's breach of duty. The appellant may not take advantage of his own wrong to ground any defence on his breach of duty. Although the property in the lease vested in the trustee, yet, if there had been no disclaimer at the time of the discharge, the trustee was *functus officio*, so that the property in the lease went back to the appellant: *Ponsford* v. *Abbott* (3).

Luxmoore, L.J. [delivering the judgment of the court]: On Dec. 9, 1935, the Metropolis Estates Co., Ltd., hereinafter called the lessors, demised to Max Simon Wilde and the British and International Press, Ltd., a flat known as No. 74, Clifford's Inn. The demise was for the term of 7 years from Dec. 25, 1935, at a yearly rent of £200, inclusive of service and the use of certain electrical appliances. This rent was payable in advance by equal quarterly instalments of £50 each on the usual quarter days. The lease contained covenants by the lessees to pay the rents in the manner stated. At the date when this lease was executed, Wilde and his wife were residing in the flat, and they continued to reside there until Dec., 1939.

On Dec. 6, 1935, three days before the date of the lease, a petition in bankruptcy was presented against Wilde, the act of bankruptcy relied on being the failure to comply with a bankruptcy notice on or before Nov. 25, 1935. On Jan. 9, 1936, a receiving order against Wilde was made on the petition, and on Jan. 10, 1936, he was adjudicated bankrupt, the Official Receiver being appointed the trustee in the bankruptcy. On June 30, 1936, Wilde obtained his discharge, subject to its suspension for 12 months, so that the discharge became effective on June 30, 1937. Wilde did not disclose to the Official Receiver his interest under the lease of Dec. 9, 1935, and consequently no steps were taken to deal with that interest, either by way of disclaimer or otherwise, but in law this interest in the lease vested in the Official Receiver on the adjudication. On Oct. 27, 1939, the lessors instituted an action in the King's Bench Division against Wilde claiming £50 in respect of one quarter's rent due in advance on Sept. 29, 1939, under the lease. When an application was made by the lessors for leave to sign judgment under R.S.C., Ord. 14, Wilde put in an affidavit disclosing to the lessors for the first time the facts with regard to his bankruptcy, and claiming that all future rent under the lease subsequent to the adjudication was a debt provable in his bankruptcy, and that by reason of his discharge he was released from all liability in respect of this future rent, and also under the lessee's covenants in the lease. Wilde was given leave to defend the proceedings, which were remitted to the Mayor's and City of London Court for trial.

On Feb. 2, 1940, the Official Receiver, as Wilde's trustee in bankruptcy, purported to disclaim Wilde's interest under the lease of Dec. 9, 1935. On Mar. 4, 1940, the lessors amended their claim against Wilde by claiming in the alternative that the £50 constituted arrears of rent due under a tenancy from year to year of the flat, No. 74, Clifford's Inn. The tenancy from year to year was said to have been created by Wilde continuing in occupation of the flat and paying rent for it from Jan. 10, 1936, the date of his adjudication, or, alternatively, from June 30, 1937, the date when his discharge in bankruptcy became effective. The suit came on for hearing before the Common Serjeant on Apr. 17, 1940. Wilde set up a number of defences. First, he claimed that his trustee in bankruptcy had disclaimed his interest in the lease of Dec. 9, 1935, and that he was thereby released from any further liability thereunder. Secondly, he claimed that the lessors' claim against him was provable in his bankruptcy, and that by reason of his discharge on June 30, 1937, he was released from all liability in respect thereof. Thirdly, he denied that he had become a tenant from year to year in respect of the premises, and contended that it was impossible for such a tenancy to be created, having regard to the continued existence of the lease. This contention is clearly correct, and we do not propose to refer to it further. Indeed, the point was not pressed by the lessors in this court. The Common Serjeant in a reserved judgment found in favour of the lessors, and entered judgment against Wilde for £50, with costs on the High Court scale down to the date of remission, and from that date with costs on the C2 scale. Wilde has appealed to this court from that decision, and his counsel has put forward the same contentions as were put forward in the court below.

In our judgment, there is no substance in either of the first two points raised. There has been no valid disclaimer of the lease, because there has been no compliance with the statutory provisions relating to disclaimer. Such provisions are contained in the Bankruptcy Act, 1914, A s. 54. Sect. 54 (1) provides as follows :

> . . . the trustee . . . subject to the provisions of this section, may, by writing signed by him, at any time within 12 months after the first appointment of a trustee or such extended period as may be allowed by the court, disclaim [any onerous] property : Provided that, where any such property has not come to the knowledge of the trustee within one month after such appointment, he may disclaim such B property at any time within 12 months after he has become aware thereof . . .

By subsect. (3) it is provided as follows :

> A trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such C orders with respect to fixtures . . . and other matters arising out of the tenancy, as the court thinks just.

Under the Bankruptcy Rules, 1915, r. 276, those being the rules referred to in sect. 54 (3) to which we have already referred, it is provided by subrule (1) that a lease may be disclaimed without the leave of the D court in a number of specified cases which admittedly do not cover Wilde's interest in the lease, while by subrule (2) it is provided as follows :

> Except as provided by this rule, the disclaimer of a lease without the leave of the court shall be void.

It is plain, therefore, that the attempted disclaimer of Feb. 2, 1940, E was void, and Wilde's interest in the lease still remains vested in the Official Receiver. The position of the Official Receiver with regard to that interest is the same as if it had been assigned to him by Wilde, and, so long as that interest remains vested in him, he appears to remain liable for rent by privity of estate, but he is under no liability in respect F of Wilde's contract with the lessors : *Hopkinson* v. *Lovering* (1).

The question remains, therefore, whether Wilde's liability to the lessors by privity of contract remains unaffected. It was said that it had disappeared, because the liability for all future rent under the lease was a debt provable in Wilde's bankruptcy, and that, when his discharge took G effect, he was released from that liability. The fallacy in this argument is that the premise on which it is based—namely, that the lessors were entitled to prove in Wilde's bankruptcy for all future rent under the lease—is without foundation, for, where a lessor is seeking to prove against a bankrupt lessee's estate in respect of an existing lease, he can H only prove for the arrears of rent due and the breaches of covenant which have taken place up to the time of proof : *Re New Oriental Bank Corpn.* (*No. 2*) (2). This being so, Wilde's discharge had no effect with regard to future rent under the lease, for it is provided by the Bankruptcy Act, 1914, s. 28 (2), that an order of discharge shall release the bankrupt from all debts provable in bankruptcy, with certain exceptions specified in subsect. (1) which are not material to be mentioned in the present case. As already pointed out, future rent is not a debt so provable, and, consequently, the liability for it remained unaffected in Wilde at all material times. For these reasons, we are satisfied that Wilde remained liable to the lessors by privity of contract as one of the original lessees in respect of the quarter's rent of £50 which became payable under the lease on Sept. 29, 1940, and that the Common Serjeant's judgment directing Wilde to pay this sum to the lessors was correct, and ought to be confirmed. The appeal will therefore be dismissed, and the appellant must pay the respondents' costs of the appeal.

Appeal dismissed with costs.

Solicitors: *Arnold A. Finer* (for the appellant); *Bernard Ashley Hill* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

O'GRADY *v.* M. SAPER, LTD.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Tucker, J.), **July 2, 3, 1940.**]

Master and Servant—Remuneration—Wages—Right to wages while absent through illness.

The respondent, who was employed by the appellants as a commissionaire at a weekly wage, claimed wages in respect of a period during which he was absent through illness. On several previous occasions he had been absent through illness, had not then been paid wages and had acquiesced in that position:—

HELD: the facts proved showed by implication that there was no agreement that the respondent should be paid wages while absent through illness and he was not entitled to recover.

[EDITORIAL NOTE. The general view was that, unless there was an express term of the contract to the contrary, a servant was entitled to his wages during temporary illness, provided that he was ready and willing to carry out his duties save for the incapacity produced by the illness. It was thought that *Cuckson* v. *Stones* (1858), 1 E. & E. 248, 34 Digest 71, *483*, laid down a rule that there was no implied term suspending the right to wages during temporary illness, and that this view had been approved in several subsequent cases, but the present decision suggests that there is no presumption either way, and that the facts of the agreement must be proved in every case.

AS TO WAGES DURING ILLNESS, see HALSBURY, Hailsham Edn., Vol. 22, p. 134, para. 222; and FOR CASES, see DIGEST, Vol. 34, p. 86, Nos. 631-640.]

Cases referred to:

(1) *Marrison* v. *Bell*, [1939] 2 K.B. 187; [1939] 1 All E.R. 745; Digest Supp.; 108 L.J.K.B. 481; 160 L.T. 276.

(2) *Petrie* v. *Mac Fisheries, Ltd.*, [1940] 1 K.B. 258; [1939] 4 All E.R. 281; Digest Supp.; 161 L.T. 408.

(3) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 34 Digest 88, *649*.

Appeal by the defendants from a judgment of His Honour Judge
Owen Thompson, K.C., delivered at Bow County Court on Feb. 26,
1940. The claim was for £45 for wages due from the defendants to
the plaintiff as a commissionaire at a weekly wage of £3 during 3 periods
when he was absent through illness. He said in evidence that he was
first employed with the defendants in Dec., 1936, and that nothing was A
then said about wages during illness. He was first away through illness for
one or two days and then about a week in 1937, and made no claim for
those absences. From May 27, 1938, to June 24, 1938, he was ill in
hospital, and was paid no wages. In the autumn of 1938, he had 6 weeks in
hospital, was paid no wages, and was discharged on his recovery. He was B
re-employed in Feb., 1939, and was ill again in May for 2 weeks. His
employer then offered him 3 weeks' pay and a week's notice. The
plaintiff admitted in cross-examination that, until he saw "the piece in
the paper," an abbreviated report of *Marrison* v. *Bell* (1), he neither
asked for payment during illness nor expected it. The employers said C
in evidence that, after the plaintiff returned from a week's absence in
June, 1937, the plaintiff was told that he was not paid for absence
through illness. The plaintiff accepted the position, and went on
working. He made no claim while in the service of his employers. When
he was first engaged, he knew quite well that his predecessor was not D
paid when ill. Employees who were absent through illness and who
asked to be reinstated were almost invariably reinstated. The judge
considered, however, that he was bound by the decision in *Marrison*
v. *Bell* (1), in the absence of evidence of the terms of the contract of
service, to follow a rule of common law by which an employer should E
be liable to pay an employee full wages during illness. He therefore
gave judgment for the plaintiff for his claim of £45. The defendants
appealed.

P. Malcolm Wright (for *H. J. Phillimore* on war service) for the
appellants. F

R. E. L. Parry for the respondent.

MacKinnon, L.J.: In this case, the plaintiff was a commissionaire
who had been employed by the defendants to attend to a gate at their
works. He was engaged in Dec., 1936, first at a wage of £2 15*s*. per G
week and then at £3 per week. He continued in their employment for
more than 3 years. During the time when he was working for them,
he was away ill for 4 weeks in 1938, and during his absence he did not
receive any wages. Again in 1938 he was away ill for 9 weeks, and
again he was not paid any wages during his absence. In 1939, he was H
away through illness for 2 weeks, and again he did not receive any
wages. He said in his evidence that at these times he did not expect
to be paid, and that it did not occur to him that he had a claim for
wages whilst he was not working. Then he went on to say:

> Till I saw the piece in the paper, I neither asked for payment during illness nor expected it.

The piece in the paper was, one may gather, some journalistic summary of the recent decision in the Court of Appeal in *Marrison* v. *Bell* (1). The headnote of the case is as follows:

> Illness of a servant, which, while it lasts, incapacitates him for the performance of his duties, but is not so long-continued or so serious as to terminate the contract of service, does not at common law suspend his right to wages under the contract.

In terms, that appears to be a statement of a principle of the common law, but it is not, and cannot be, any statement of any principle of the common law. The whole question in such a case as this is what the terms of the contract between the employer and the servant were and what those terms provided in regard to payment of wages to him during his absence from the service by reason of illness. As pointed out by Atkinson, J., in *Petrie* v. *Mac Fisheries, Ltd.* (2), at pp. 269, 270 ([1939] 4 All E.R., at p. 291):

> The question must depend, as indicated in the notes to *Cutter* v. *Powell* (3) (Smith's Leading Cases, 13th Edn., Vol. 2, p. 49), on the terms of the contract. "The right to wages depends upon whether the consideration therefor has been performed." It is submitted in the notes to that case, as I think rightly, that it must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration.

The sort of contract which is involved is usually concluded orally by people who really do not think out, and still more do not express, any terms. The whole difficulty in such a case is to ascertain what in truth the terms of the contract were. Where the terms are not expressed, it may be that one has to ascertain them as a matter of implication. In any case, it is a matter based upon the evidence in the case. What were the terms of the employment? Was it agreed that the man should be paid when he was ready and willing to work, or that he should be paid only when he was actually working? In this case, as it seems to me, there was abundant evidence that the terms, not expressed, but no doubt implied, upon which this man was employed were that he should not be paid wages whilst he was sick. Conclusive evidence of that is furnished by the fact that on at least three occasions during the time he had been employed he was not paid wages when he was away sick, and he acquiesced in that position. As he said:

> Till I saw the piece in the paper, I neither asked for payment during illness nor expected it.

As was rightly pointed out by Tucker, J., during the discussion, if one is to ascertain the implied terms, one has to ask oneself: "If somebody had raised the question when they were originally making the bargain, what would they both have said about it?" In this case, what they would both have said about it is best proved—and I think is conclusively proved—by what the parties did when the event arose. When the event arose and the employee was away ill, he was not paid. He acquiesced in that and, as he said, did not think that he ought to have his wages. He did not expect to get them. Therefore, on the question of fact—and it is a question of fact alone which is involved in this case—I come without hesitation to the conclusion that the terms of the contract between these parties was that the employee should be paid, not during the period when he was ready and willing to work, but only during such period as he did work. I regard it as most unfortunate that the headnote in *Marrison* v. *Bell* (1) should have purported A to lay down and to state as a principle of common law that a man who is incapacitated through illness is entitled to his wages during that illness. The judge, who was misled, as I think, and perhaps very reasonably misled, by the headnote in *Marrison* v. *Bell* (1), said:

> In the absence of evidence as to the terms agreed when the man was engaged B in 1936, in my view there was no express and no implied term to prevent the normal rule from applying.

I understand that to mean that he accepted as the normal rule of common law that which is stated in the headnote in *Marrison* v. *Bell* (1). It is nothing of the sort. It is a pure question of fact in every case. In this C case, I am quite satisfied that the agreement was that he should not be paid during illness, and, therefore, the claim ought to have been dismissed. As a result, I think that the appeal should be allowed and judgment entered for the defendants with costs here and below.

D

LUXMOORE, L.J.: I agree.

TUCKER, J.: I agree.

Appeal allowed. Judgment entered for the defendants with costs in both courts.

Solicitors: *James H. Fellowes* (for the appellants); *Kenneth Brown, Baker, Baker* (for the respondent). E

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

F

ALLIGHAN *v.* LONDON AND WESTMINSTER LOAN AND DISCOUNT CO., LTD.

[KING'S BENCH DIVISION (Singleton, J.), **July 9, 1940.**]

Moneylending—Memorandum—Loan made up of previous loans and new loan —Details of previous loans—Principal and interest payable in lump sum G *on stated date—No power to charge interest after stated date—Whether sum paid for stamp duties to be included in memorandum—Inclusion of schedule in copy of bill of sale attached to memorandum—Moneylenders Act,* 1927 *(c.* 21), *s.* 6.

The defendants were registered moneylenders. The plaintiff entered into two loan transactions with them, one in Dec., 1938, and the other H in Feb., 1939. The memorandum in respect of the earlier transaction referred to certain earlier loans by the reference numbers used in respect of those loans in the defendants' books. The plaintiff had himself also referred to those transactions by those numbers. In respect of one of the earlier transactions, the principal and interest were payable in one sum on Aug. 2, 1938, but no provision was made for the payment of interest after that date. The memorandum of the consolidating transaction in Dec., 1938, charged interest on that transaction after Aug. 2, 1938.

The stamp duties on the documents and expenses in respect of the transaction in Feb., 1939, were 15*s*. 10*d*., and these were paid by the plaintiff to the defendants at the time of the loan. It was contended that they were part of the loan, and should have been mentioned in the memorandum.

A The loan of Feb., 1939, was secured by a bill of sale, to which was attached a schedule describing the goods comprised therein. The copy of the bill of sale attached to the memorandum did not include this schedule :—

HELD : (i) the reference in the memorandum of Dec., 1938, to previous transactions by numbers was sufficient, and did not invalidate the memorandum.

B (ii) the failure to provide for the payment of interest after Aug. 2, 1938, made interest irrecoverable after that date, and the memorandum of the transaction of Dec. 14, 1938, was in consequence inaccurate in that it stated a larger amount to be owing than was in fact due, and failed to comply with the Moneylenders Act, 1927, s. 6.

(iii) the amount of the stamp duties and expenses became a simple C contract debt due to the defendants by the plaintiff, and, in the circumstances of this case, it was unnecessary to mention them in the memorandum.

(iv) the omission of the schedule from the copy of the bill of sale supplied to the plaintiff did not invalidate the memorandum.

[**EDITORIAL NOTE.** Where there is a covenant to pay principal and interest D on a stated date, there is no implied covenant to pay interest at the same rate after that date. Such interest, therefore, cannot be recovered, though the court may award it under the statutory power. The question which here arose on the payment of stamp duties was decided on analogy with the position which arises as to the costs of a solicitor negotiating a loan. Such costs are a debt due by the mortgagor to the mortgagee, but are not one which the mortgagee can add to his E security apart from a special provision to that effect.

AS TO SUFFICIENCY OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190, 191, para. 280 ; and FOR CASES, see DIGEST, Supp., Money and Moneylending, Nos. 353a-353y.]

Cases referred to :

(1) *Cook* v. *Fowler* (1874), L.R. 7 H.L. 27 ; 35 Digest 177, *67* ; 43 L.J.Ch. 855.

F (2) *Wales* v. *Carr*, [1902] 1 Ch. 860 ; 35 Digest 670, *4064* ; 71 L.J.Ch. 483 ; 86 L.T. 288.

(3) *Reading Trust, Ltd.* v. *Spero, Spero* v. *Reading Trust, Ltd.*, [1930] 1 K.B. 492 ; Digest Supp. ; 99 L.J.K.B. 186 ; 142 L.T. 361.

(4) *Lawrence, Ltd.* v. *Crowder* (1938), July 28, Unreported.

G ACTION for a declaration that certain transactions were unenforceable by reason of the insufficiency of the memorandum of loan and for the return of a policy of insurance.

Harry Samuels for the plaintiff.

P. H. Thorold Rogers for the defendants.

H

SINGLETON, J. : The plaintiff had a number of moneylending transactions with the defendant company, but in Dec., 1938, there were two, and only two, outstanding. On Dec. 14, 1938, these two, in so far as they were outstanding, were embraced, or sought to be embraced, in a new contract or arrangement, dated Dec. 14, 1938. Thereafter, there was another transaction, dated Feb. 1, 1939, and in this action the plaintiff seeks relief in respect of those two transactions. In regard to the agreement dated Dec. 14, 1938, counsel for the plaintiff submitted that the note or memorandum of that transaction was not a note or memorandum which complied with the Moneylenders Act, 1927, s. 6, because (i) the amount stated as the total amount advanced was not the sum of £140; (ii) the document itself, showing, as a combination of two earlier transactions, amounts previously advanced of £270, and giving two numbers of those transactions, which are numbers from the defendants' books, was insufficient, in that it did not show the dates of those previous transactions, when the loans were required, or for how long, and there was no splitting up, so that the borrower did not know what his position was under each individual transaction; (iii) the rate of interest was stated as 25 per cent. The interest was also stated as a lump sum of £39 4*s*., and, it being so stated, a calculation on the basis of the schedule to the Act would have shown 26.88 per cent.

The Moneylenders Act, 1927, s. 6, provides as follows:

> (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within 7 days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be. (2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the first schedule to this Act.

To deal with the last point taken by counsel for the plaintiff under the December contract, in my view, the interest charged on the loan in terms of a rate per cent. is expressed in the note or memorandum dated Dec. 14, 1938, in the words, "Interest charged at the rate of 25 per cent. per annum," so that that point fails.

The note or memorandum of the contract dated Dec. 14, 1938, is by no means clear in its terms. On the face of it, it sets out a combination of two old transactions, the dates of which are not given. I do not regard that as a matter of moment, because it is clear from the correspondence which took place that the male plaintiff knew that there were only two transactions outstanding. He had referred to them by number, after the defendants had done so, and he was well aware what those transactions were, but, in the way in which the two are lumped together, and in the general form of this document where it is sought to embrace two old transactions, I think that it is far from clear, and I am satisfied that the defendants themselves could devise something much clearer than this, and something which could be much better understood by a borrower, who is to be regarded, for the purpose of this Act, as a needy borrower. When this document was explained to me by counsel for the plaintiff, I am bound to say that the explanation he gave me was not very clear, and, when counsel for the defendants arose to do so, his explanation of the document was quite different. That shows that the document does not make the matter clear of itself. The object of the note or memorandum mentioned in the Moneylenders Act, 1927, s. 6, is to have something which the borrower can understand and from which he will gather what his liabilities are, and, if there has been an earlier transaction, what the result is. I do not think that this document achieves that object. It may be that, if the borrower were fortunate enough to have the secretary of the defendant company at his elbow to explain to him precisely how those sums were arrived at, he might follow it, but if both counsel, with the help of solicitors and advisers upon these matters, cannot agree what the document means, how can a borrower ? The memorandum is not clear. I do not decide this case upon that matter only, but I do point out that I believe it to be the duty of those who supply to the borrower the note or memorandum of contract to make the matter clear. It is not clear upon that document, and, if the note or memorandum is insufficient, it matters not whether or not there has been correspondence to make it clear, or whether or not there have been conversations as well. The result is that the document does not comply with the requirements of the Act.

Among the figures of the document of Dec. 14, 1938, there are these. The amount previously advanced under two earlier transactions is stated to be £270, and then there are several amounts of interest which are treated as payments in full, totalling under the two contracts £56 18*s.*, and the amount paid on account of principal is £136 15*s.*, from which it appears that there is a balance owing of £133 5*s.* The amount which is said to be advanced, then, is £6 15*s.*, making the total amount £140, and interest is charged at the rate of 25 per cent. per annum, which equals £39 4*s.* Thus, the total amount said to be owing on the new loan is £179 4*s.*, which is repayable by monthly instalments of £7 9*s.* 4*d.* The amount in the promissory note is £179 4*s.*, and forming part of the note or memorandum is a mortgage of the insurance policy on the life of the plaintiff. The interest figures are shown as £38 8*s.*, which is the interest said to have accrued and to have been paid on the old transaction, and £18 10*s.*, making a total of £56 18*s.*, as I have mentioned already. The £18 10*s.* is said to be interest on an earlier transaction, dated May 2, 1938, when £130 was borrowed and interest was charged at the rate of 30 per cent. per annum, repayment to be made in one sum on Aug. 2, 1938. In that case, the note or memorandum included a bill of sale, which, in regard to the goods dealt with in it, provided that the lender should hold the same by way of security for the payment of the sum of £130 and interest thereon at the rate of 30 per cent. per annum :

> . . . and the said mortgagor doth further agree and declare that he will duly pay

> to the said company the principal sum aforesaid together with the interest then due on Aug. 2 next.

Several lines are struck out of the printed form, and that, as I read it, is a covenant, and, indeed, the note or memorandum shows that it is a covenant, to pay the principal sum and interest on Aug. 2, 1938—namely, three months after the date of borrowing. There is no provision anywhere for the payment of interest, either at 30 per cent. or at any other rate, after Aug. 2, 1938. Counsel for the defendants argued that interest would continue to run at the same figure after Aug. 2, 1938, and, upon my asking him on what he based that contention, he submitted that it was implied in law. I asked him if there were any authorities dealing with this point, and he cited *Cook* v. *Fowler* (1), from which it appears that, if there is a covenant to pay upon a certain date, one cannot imply that there was a covenant to pay interest at the same rate after the date on which the principal sum fell due. It may be that, if the principal sum is not paid upon that date, the lender who ought to have been paid on the due date may recover as damages the equivalent of the interest, but that is a matter for the court. In these circumstances, it seems to me that, upon the agreement dated May 2, 1938, and upon the covenant in the indenture dated May 2, which is part of the note or memorandum of contract, there is no provision for interest to be paid after Aug. 2, 1938. When the defendant company were approached by the plaintiff in Nov., 1938, and Dec., 1938, for a further loan, they calculated the interest as though it were running after Aug. 2, 1938, and they then made out that upon the transaction in May, 1938, there remained due on Dec. 14, 1938, £89 15*s*., while on the earlier transaction in Mar., 1937, or Apr., 1937, there was £43 10*s*. due. They added those two sums together to get the total of £135 5*s*., the total amount said to be due on the two transactions, and they then added £6 15*s*., the amount then advanced, to make the round sum of £140. The interest due upon the May transaction was not £18 10*s*., but was only about £9 15*s*., and, in the result, the sum of £18 10*s*., stated in the document of Dec. 14, the note or memorandum, as the amount of interest payable, and claimed, is too high. It ought to have been £9 15*s*. That being so, the balance due is wrongly stated, and the total amount said to be advanced is wrongly stated. If that is right, counsel for the defendants very fairly admits that he cannot say that the note or memorandum is a note or memorandum within the meaning of the Moneylenders Act, 1927, s. 6, because it does not accurately set out the arrangement between the parties. He argued, at one time, that the defendants were entitled to say that the correspondence and the evidence of the secretary of the defendant company showed that the transaction had been explained to the borrower and that the borrower agreed to these sums, but I cannot find that it was ever explained to the borrower that there was any question whether that interest was payable, or that there might be a right to claim damages in respect of it, nor can it be said that there was any agreement by him by which the damages were taken as being the difference between £9 15*s.* and £18 10*s.* I do not think that there was. Thus, entirely apart from the lack of clarity, upon the note or memorandum dated Dec. 14, 1938, I think that the fact that the figures are wrong in the way in which they are given is sufficient A to make it clear that the note or memorandum is not a note or memorandum within the meaning of sect. 6 of the Act. In my view, the plaintiff is entitled to succeed on that document. I do not attach importance to the fact that the borrower was not informed of the precise dates of the transactions, and it is not necessary for me to go further B into the matter than to say that, for the reasons I have given, the plaintiff is entitled to relief in respect of the transaction dated Dec. 14, 1938.

I now come to the document relating to the later transaction of Feb. 1, 1939, when the plaintiff borrowed £100 from the defendants, C the rate of interest charged being 30 per cent., while the repayment was to be by a lump sum on May 1, 1939. Counsel for the plaintiff raised three questions upon this transaction, two of them again relating to the note or memorandum. His first submission is that there was an agreement between the parties as to the payment of the stamping expenses, D which were to be paid by the plaintiff. However, there is no mention of that in the note or memorandum. In fact, 15*s.* 10*d.* was paid on the day of the transaction, and he alleged that that was part of the contract and ought to have been noted in the memorandum. That is based on a copy of a letter, dated Jan. 13, 1939, from the secretary of the defendant E company to Allighan. The last sentence of that letter is as follows:

> The stamp duties, etc., upon the new document will amount to 15*s.* 10*d.*

Counsel for the defendants submitted that there was no reason whatever for any mention of that 15*s.* 10*d.* in the note or memorandum of con- F tract, and I think that he was right. In the first place, the letter of Jan. 13 does no more than draw the attention of the borrower to the fact that the stamp duties will be a certain sum. It does not call upon the borrower to pay that amount. There is no evidence whatever that the borrower was asked to pay that amount, or that he paid it as part G of the contract between the parties. The secretary of the defendant company told me that it was not a part of the contract, but that the borrower had been warned what the amount of it was, and that it was not until after they had given the borrower the cheque for the total amount which he was borrowing that he thereafter paid the amount of H the stamp duties by another cheque. It is true that that might be "paying" in a sense, and it might have been part of the bargain, but there was no proof whatever to show that it was so. Counsel for the defendants referred me to *Wales* v. *Carr* (2), the headnote of which is as follows:

> A mortgagee's solicitor's costs of negotiating the loan and preparing the mortgage

> deed become, on completion of the transaction, a simple contract debt at common law due to the mortgagee by the mortgagor; and cannot be added by the mortgagee to his security as part of the costs, charges, and expenses properly incurred under or by virtue of his mortgage.

Thus, I think that it may be said in a case such as this either that the stamp duty and expenses of that kind become a simple contract debt due to the mortgagee by the mortgagor—that is, to the lender by the borrower—or, in other words, that it is well understood by the borrower that, if he did get this further loan, he would pay the stamp duties and expenses. In any event, the plaintiff fails upon this point, as he has not shown me that there was any contract or any term of the contract which had been, or ought to have been, put in the note or memorandum. He fails entirely upon that. Moreover, counsel for the defendants has read to me an extract from a judgment given in an unreported case by Lewis, J., in 1937, from which it appears that he then reached the same conclusion on this point as I do now.

The second point taken by counsel for the plaintiff upon the note or memorandum dated Feb. 1, 1939, is that the goods which are comprised in the bill of sale, which is part of the note or memorandum, are not entered upon the copy of the bill of sale supplied with the note or memorandum. In other words, the note or memorandum is there, with the copy of the bill of sale as supplied, but the copy bill of sale does not include any schedule. The bill of sale itself did include a schedule of certain contents of the flat which were subject to the bill of sale dated Feb. 1, 1939, and counsel for the plaintiff submitted that, as a copy supplied as part of the memorandum did not include the schedule, the plaintiff had not a complete note or memorandum, and did not know, indeed, which of his goods might be seized. At first, that argument attracted me, and, knowing, as I do, how the decisions of the courts interpret strictly the terms of the Moneylenders Act, 1927, s. 6, I thought for a time that this was a failure to state in the note or memorandum all the terms of the contract. However, counsel for the defendants referred me to the decision of the Court of Appeal in *Reading Trust, Ltd.* v. *Spero* (3), and in particular to the words of Scrutton, L.J., at p. 505, and also to an unreported decision of Macnaghten, J., in *Lawrence, Ltd.* v. *Crowder* (4). In that case, Macnaghten, J., held, on facts such as these, that it was unnecessary to set out in the note or memorandum the schedule to the bill of sale. In *Reading Trust, Ltd.* v. *Spero* (3), Scrutton, L.J., said, at p. 505:

> It seems clear in sect. 6 that the legislature, while requiring a copy of the contract to be signed, has not required a copy of the security to be sent to the borrower, and it may need consideration whether if there is a more onerous term in the security than in the contract, the note of the contract may not be incomplete.

I am disposed to think that, where the contract contemplates a promissory note as security and there is a promissory note in the ordinary form, not contradicting the contract, the fact that the contract does not set out the terms of the promissory note will not invalidate the contract. It may be otherwise if the security contains an onerous term not in the contract. However, I reserve any final decision on this question, which does not seem to me to arise in the present case.

I assume that it is necessary to set out the terms of the security if the security contains an onerous term not in the contract, but, if the note or memorandum includes a copy of the security itself, and if the borrower is told in that copy of the right of procedure on all and singular the articles named in the schedule, I cannot see that it is necessary, for the protection of the borrower, to mention every stick and every pan in the schedule to the bill of sale, nor can I see that it is necessary that it should be set out again in the copy of the note or memorandum. That is the decision at which Macnaghten, J., arrived in *Lawrence, Ltd.* v. *Crowder* (4). I confess that the argument of counsel for the plaintiff did attract me at first, but it seems to me to be putting an undue burden on a lender, and I think that, in those circumstances, it is right to follow the decision of Macnaghten, J., in *Lawrence, Ltd.* v. *Crowder* (4) on facts which I am told, on this part of the case, were just the same as these.

The other point raised by counsel for the plaintiff was that, apart from any question under the Moneylenders Act, 1927, the bill of sale of Feb., 1939, was itself void, in that it did not disclose the true consideration. The reason for that submission was that there was no mention of the 15*s.* 10*d.* and the stamp duties, etc. I think that that point must fail. The true consideration was stated, and the fact that the stamp duties were going to be paid in the ordinary way and according to the usual custom by the borrower does not mean that the 15*s.* 10*d.* was part of the consideration. At least, I do not think that it does. Accordingly, that point fails. That, I think, is sufficient to dispose of the matters raised before me. It follows that the plaintiff is entitled to judgment, to a declaration that the contract dated Dec. 14, 1938, is void and unenforceable, and to a return of the security given in connection with that contract, and that is all I think he is entitled to. His claim fails with regard to the transaction of Feb., 1939.

Solicitors: *Arthur Dollond & Co.* (for the plaintiff); *Arthur Pyke & Co.* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re DIPLOCK, WINTLE AND OTHERS *v.* DIPLOCK AND OTHERS.

[Chancery Division (Farwell, J.), **July 18, 1940.**]

Charities—Charitable purposes—" Such charitable institution or institutions or other charitable or benevolent object or objects "—" Or benevolent "—Validity.

The testator by his will gave £5,000 each to his executors, certain private legacies, certain sums to named charities, and, by cl. 6, the residue of his estate on trust " for such charitable institution or institutions or other charitable or benevolent object or objects " as his executors might in their absolute discretion select. After the estate had been wound up and the residue distributed to numerous charities, the next of kin claimed that the gift was not a good charitable bequest. It was contended on their behalf that the words " or benevolent " in cl. 6 of the will might embrace objects not strictly charitable, and that the whole of the bequest of the residue was, therefore, void for uncertainty, and failed :—

Held : the bequest was not void for uncertainty. On the construction of the will as a whole, the testator had clearly shown an overriding intention to benefit only objects which were charitable in the strict sense, and the words " or benevolent " as used in this will did not extend the class of objects to be benefited.

[**EDITORIAL NOTE.** In a recent case, the use of the words " or benevolent " was described as a trap into which the unskilled draftsman not infrequently falls. The Court of Appeal seem to have thought that the authority of *Hunter* v. *A.-G.* (3) rendered the trap one from which there was no escape. It would seem, however, that the well-known rule, that a will must be construed as a whole, will in certain cases, provide a means of escape and in the present case it has been held that the will shows such a clear intention to benefit charitable objects only that the words " or benevolent " do not extend the class of objects which may be benefited, or, to use the phrase used in the Court of Appeal, do not add the field of benevolence to the field of charity already provided for.

As to Alternative Charitable or Other Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 167-169, para. 221 ; and for Cases, see DIGEST, Vol. 8, pp. 294-297, Nos. 719-740.]

Cases referred to :

(1) *Ellis* v. *Selby* (1836), 1 My. & Cr. 286 ; 8 Digest 295, *726* ; 5 L.J.Ch. 214.

(2) *Re Jarman's Estate, Leavers* v. *Clayton* (1878), 8 Ch.D. 584 ; 8 Digest 295, *727* ; 47 L.J.Ch. 675 ; 39 L.T. 89.

(3) *Hunter* v. *A.-G.*, [1899] A.C. 309 ; 8 Digest 291, *687* ; 68 L.J.Ch. 449 ; 80 L.T. 732 ; *revsg.* S.C. *sub nom. Re Hunter, Hood* v. *A.-G.*, [1897] 2 Ch. 105.

(4) *Re Horrocks, Taylor* v. *Kershaw*, [1939] P. 198 ; [1939] 1 All E.R. 579 ; Digest Supp. ; 108 L.J.P. 86 ; 160 L.T. 324.

(5) *A.-G. for New Zealand* v. *Brown*, [1917] A.C. 393 ; 8 Digest 298, *748* ; 86 L.J.P.C. 132 ; 116 L.T. 624.

(6) *Re Best, Jarvis* v. *Birmingham Corpn.*, [1904] 2 Ch. 354 ; 8 Digest 297, *744* ; 73 L.J.Ch. 808.

(7) *Dolan* v. *MacDermot* (1868), 3 Ch.App. 676 ; 8 Digest 298, *751*.

(8) *Re Bennett, Gibson* v. *A.-G.*, [1920] 1 Ch. 305 ; Digest Supp. ; 89 L.J.Ch. 269 ; 122 L.T. 578.

(9) *Re James, Grenfell* v. *Hamilton*, [1932] 2 Ch. 25; Digest Supp.; 101 L.J.Ch. 265; 146 L.T. 528.

(10) *Re Ludlow, Bence-Jones* v. *A.-G.* (1923), 93 L.J.Ch. 30; Digest Supp.

(11) *Morice* v. *Durham* (*Bp.*) (1805), 10 Ves. 522; 8 Digest 293, *705*.

(12) *Lewis* v. *Allenby* (1870), L.R. 10 Eq. 668; 8 Digest 283, *587*; *subsequent proceedings* (1871), 25 L.T. 785.

A

ADJOURNED SUMMONS to determine whether, upon the true construction of the will of Caleb Diplock, the bequest of residue contained in cl. 6 thereof in favour of "such charitable institution or institutions or other charitable or benevolent object or objects in England" was a
B valid charitable trust or whether it was void for uncertainty and the testator's residue undisposed of.

J. Leonard Stone for the trustees.

C. L. Fawell for the next of kin.

C. E. Harman, K.C., and *W. S. Wigglesworth* for the charities.

C *Wilfrid M. Hunt* for Lieut.-Col. Raymond Johnson, one of the trustees of the Diplock Cottage Homes, a charity founded under the terms of the will.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *A. Andrewes Uthwatt* for the Attorney-General.

D *Stone* stated the facts.

Fawell: This residuary bequest was void for uncertainty. The words "or benevolent" might embrace objects which were not charitable. In *Ellis* v. *Selby* (1), a gift "for such charitable or other purposes" as the trustees should think fit was held void for uncertainty, and in *Re*
E *Jarman's Estate, Leavers* v. *Clayton* (2) a gift of residue to be applied to "any charitable or benevolent purpose" which the executors might agree upon at any time was held too indefinite and inoperative, and the gift failed. If the gift were extended to objects which were not charitable, these objects would not be within the control of the court, as, not being
F charitable, they could not be defined, but, in the case of charitable funds being misapplied, the Attorney-General can take steps to ask the court to interfere in such a misapplication. In *Hunter* v. *A.-G.* (3), LORD DAVEY said, at p. **323**:

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> . . . where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as "charitable or benevolent" . . .) . . . and a discretion is vested in the trustees, the whole gift fails for uncertainty.

In *Re Horrocks, Taylor* v. *Kershaw* (4), the language was precisely the same as that used here—namely, "for such charitable institution or
H institutions or other charitable or benevolent object or objects" in Preston as the trustees in their discretion might select—and the gift was held void for uncertainty. The court is bound by the authorities to find this gift of residue void for uncertainty, and they must hold that it fails. [Counsel referred to *A.-G. for New Zealand* v. *Brown* (5).]

Harman, K.C.: An overriding charitable intention can be gathered from the testator's will as a whole, and the gift is not, therefore, uncertain, and ought not to fail. The only words which give rise to any difficulty are the words "or benevolent," and the inclusion of these was probably due to a draftsman's error when he was drawing the will. In *Re Best, Jarvis* v. *Birmingham Corpn.* (6), the bequest of residue "for such charitable and benevolent institutions" was held a good charitable gift, and in *Dolan* v. *MacDermot* (7) there was a bequest of personalty "for such charities or other public purposes as lawfully might be in the parish of T.," which was likewise held a good charitable gift. *Re Bennett, Gibson* v. *A.-G.* (8) was a similar case. In the present case, it would have been difficult for the trustees to have extended the bequest to objects which were not charitable, and in fact they have not done so: *Re James, Grenfell* v. *Hamilton* (9). There is authority that the words "charitable or benevolent" can yield to a general charitable intention. In *Re Ludlow, Bence-Jones* v. *A.-G.* (10), there was a gift for the endowment of hospitals and the like, and for "such hospital or other charitable or benevolent institution or institutions," which was held good. The words "benevolent institution or institutions" were construed as *ejusdem generis* with the word "hospital," and consequently an overriding charitable intention was indicated. [Counsel referred to *Morice* v. *Durham* (*Bp.*) (11), at p. 542, and *Lewis* v. *Allenby* (12).]

Hunt adopted the foregoing argument.

Attorney-General followed.

Fawell in reply.

Farwell, J.: This summons raises a question which is, I think, one of very considerable difficulty, having regard to the nature of the question and the numerous authorities to which I have been referred, and which, to a greater or less degree, have some application to the question which I have to solve. The question of construction arises upon the will of one Caleb Diplock. He made his will on Nov. 3, 1919, and he died on Mar. 23, 1936. He was a man of great wealth, but apparently with no close relations or other relations whom he desired to benefit by his will. He lived in Sussex, and by his will he appointed a lady, whom he described as his friend, his solicitor Leslie Charles Wintle, and three other persons to be his executors, and he gave to each of those persons £5,000 for acting in such capacity. In fact, the lady predeceased the testator and also one of the other named executors. In cl. 2 of his will, he gave the female executor certain specific articles and a legacy of £20,000, and in cl. 3 he devised to her his freehold messuage, South Down Hall. Those gifts failed, because, as I have said, the lady died in the lifetime of the testator. Then, in cl. 4, he gave certain legacies. The first legacy he gave to the sister of the lady executor, and the other legacies in that clause were legacies to his gardener, his cook and his two housemaids. That is the end of his benevolence, so far as it has to do with private individuals, and therefrom the rest of the will is devoted to applying his money to what one calls, quite generally, purposes other than individual benefits.

Clause 5 is as follows:

> I give the following charitable legacies free of duty namely: To the Princess Alice Memorial Hospital the sum of £5,000 to be applied for the general purposes thereof. To my executors the sum of £20,000 to be distributed amongst such hospitals homes and institutions for officers and soldiers wounded maimed blinded and disabled in the recent war as my acting executors may in their absolute discretion select and to be paid in such manner and in such shares and proportions as such executors in their uncontrolled discretion shall think fit and proper.

Then follows cl. 6, which is the clause giving rise to the problem which I have to solve. It is in these terms:

> I give the residue of my property to my executors upon trust to sell or call in the same with power to postpone such sale or calling in without being responsible for loss and out of the proceeds of such sale and calling in and out of my ready money my executors shall pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will and the duty on any legacies hereinbefore given free of duty or any codicil hereto and subject thereto shall apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select and to be paid to or for such institutions and objects if more than one in such proportions as my executor or executors may think proper.

Then cl. 7 is as follows:

> I declare that the receipts of the treasurer or other proper officer for the time being of any hospital home or other institution shall be a sufficient discharge for any legacy bequeathed given or applied thereto.

The only other clause is a charging clause, which I need not read.

As I have said, the testator died in 1936. He left a very large estate, and the surviving executors proceeded to administer that estate. They paid the debts and duties and such legacies given by the will as were effective, and they then had in their hands representing the residue of the estate a very large sum of money. I think that the total amount was over £250,000. Acting on the advice of their solicitor, who was himself one of the executors, they proceeded to distribute the funds in their hands among a very great number of hospitals and other charitable institutions. In all over 130 charities were selected by the executors. The whole of the institutions selected by them were institutions which are strictly charitable institutions, and no one has suggested that, so far as distribution amongst charitable objects is concerned, that was not what the executors had done. In fact, as I say, the distribution was made. Each of the charities was allotted the sum which the executors thought fit, and those sums have been paid over. Subsequently, the persons interested as next of kin of the testator raised the question whether the gift of the residuary estate of the testator was not invalid, on the ground that it was not charitable, and, therefore, void for uncertainty, and that, therefore, it was not validly disposed of, with the result that the next of kin would be entitled to share in that residue. The executors were faced with the difficulty that they had parted with the money in their hands in perfectly good faith to a large number of various charities, and, in those circumstances, they were not in a position, of course, to make any payment to the persons claiming to be the next of kin. Accordingly, they have issued writs against the various charities calling upon the charities to repay the moneys which they were paid by the executors, on the footing, I suppose, that the money was paid to the charities on what the executors now claim was an error or breach of trust.

In order to avoid the preliminary step in the matter, the executors, no doubt quite rightly, have thought it desirable to have the question of the construction of the will first solved, because, if, on the true construction of this will, the gift of the residue does not offend against the rule with regard to uncertainty, then, of course, there can be no question of any charity being asked to refund anything which it has received. Thus, so far as this summons is concerned, the whole matter comes down simply to a question of whether or not, on the true construction of this particular will, the residue is validly disposed of. The fact that the executors have acted in perfectly good faith in making the distribution which they have made to charitable objects and institutions cannot, of course, affect in any way the true construction of the will, and, if, in fact, on the true construction of the will, the residue has not been validly disposed of, then the fact that the distribution has been so made cannot render the ultimate gift of the residue valid if it be in truth invalid.

That being so, I have to consider this purely as a question of construction, and I have to see what, on the construction of this will, and on the language which the testator has used in this will, was the intention as expressed in that language. It has been argued that the residuary gift is invalid, and that argument is based on the ground that the objects to which the residue is to be devoted are uncertain, and that this court will never give effect to a gift which is so uncertain as not to be capable of being controlled by this court. It is said that, although, if the gift of the residue were confined to charities within the strict meaning of the word " charity," there could be no question about its being a valid gift, in this case the ambit of the gift is extended so as to embrace objects which are not charitable, and that, accordingly, that being so, the whole gift fails. So far as a gift is charitable, this court can control it, and there are means by which, in the case of a misuse of charitable funds, the Attorney-General may take steps to move the court to prevent such misapplication of the funds and call upon trustees to replace funds which have been misapplied. In the case of a gift to objects which are not all of them charitable, however, there is no such remedy open to anyone. The courts cannot say what the objects are, because, since they are not charitable, they are not defined, and, in such a case as that, the court has said that the gift must be invalid altogether, with the result that, in the case of a residuary gift, the residue passes as undisposed of.

In this case, I am faced with the difficulty that the gift of the residue is for :

> . . . such charitable institution or institutions or other charitable or benevolent

> object or objects in England as my acting executors or executor may in their or his absolute discretion select . . .

If the words " or benevolent " were not there, or even if the word " or " were changed to " and," there could, I think, be no possible question but that this gift would be a perfectly good and valid gift. However, the use of the words " or benevolent " does give rise to a very serious question. It has been decided, I think, many times, that the word " benevolent " by itself does not necessarily include only those objects which are charitable within the meaning of the word as understood in these courts, and that the word " benevolent " by itself is wide enough to embrace objects which are not charitable, and it has also been held in some cases that even coupling the word " charitable " with, or using the word " charitable " as an alternative to, the word " benevolent " may result in the same uncertainty, because the executors may be enabled to apply the same either for a charitable purpose or for a purpose which is not charitable although it may be benevolent, and that, being within the scope of the powers of the executors, renders the whole gift invalid, because the objects are uncertain. The authorities, I think, do establish that the meaning of the word " benevolent " is not *prima facie* " charitable," or it cannot be so read in a case where the word " benevolent " is treated as opposed to, or the opposite of, the word " charitable."

It has been argued on behalf of the next of kin that the authorities have decided this question in such a way that it is in no way open to me to come to any conclusions other than that in this case the gift of the residue fails, and it is said here that the use of the words " or benevolent object or objects " compels me to come to a conclusion which, in my judgment, is entirely contrary to the intention of the testator as disclosed in the language he has used, but which, it is said, is the result to which I, sitting here as a judge of first instance, am compelled to come, and, therefore, there is really, it is said, an end of the matter, because, whatever may be my own private view as to what the construction of this will ought to be, faced with the authorities, I am bound to come to the conclusion that this gift is invalid. In my judgment, that is a misconception of the true use of authorities. In a case where the court is being asked to construe a will, there are, no doubt, rules of construction which the court has to observe, but, when it is a question of the meaning of words read in connection with other words in the will, and a question of reading the whole will so as to ascertain the true intention of the testator from the language used, then I think that it is a fallacy to say that the court is necessarily bound to approach the question of intention blindfolded because of some authority, even the authority of the House of Lords, in some other case of construction where the words are not the same, and that such a decision in such a case as that is necessarily binding in any other case where the same words appear, although the connecting language as a whole may not be the same. The fact that other courts have come to a conclusion as to the meaning of such a word as "benevolent" is, of course, a matter which this court would take into the most careful consideration, and, if the court came to the conclusion that there was a definite authority binding on this court that in every case the word "charitable" or the word "benevolent" or the words "or benevolent" had to be construed so as to render a gift of this kind invalid, no doubt effect would be given to it. However, there is nothing in any case cited to me, in my judgment, binding on me which renders that the position. The truth of the matter is that the court in each case has to consider the language of the testator. The court may have to put certain meanings on certain words owing to the fact that there are authorities which control the matter, but the court has to read the will as a whole and see what the intention of the testator was, and, in my judgment, coming to a conclusion in such a case as this, I am not precluded from giving effect to what I am satisfied was the true intention of the testator, judging by the language which he has used.

In the present case, I approach this question having regard to certain facts which, in my view, I am entitled to take into consideration. The testator apparently had no near relations whom he desired to benefit. He has divided up his property by giving to a friend (who unfortunately predeceased him) a considerable sum of money and an estate. He has given another friend the sum of £5,000, and he has given small legacies to his servants. Those are the whole of the dispositions which he has made, outside what may be called his charitable gifts. Then he begins by giving legacies which he himself describes as charitable legacies, and that those legacies were charitable there can, of course, be no doubt. He gave £5,000 to a particular hospital, and he gave £20,000 to be distributed amongst certain classes of hospitals and institutions. Therefore, it is plain that, in the latter part of his will, he is directing his mind to disposing of his property in the first instance by giving a portion of it to what are, plainly and beyond doubt, charitable purposes. Then he proceeds to dispose of everything which is left, and he is minded to give his executors the widest possible power to apply his residuary estate, within a limit, to such purposes as they may choose to select. Of course, if those purposes are not purposes which are defined as charitable purposes then the gift cannot take effect at all. However, the testator does define the objects of his bounty in regard to the residue in this way. He says:

> . . . such charitable institution or institutions or other charitable . . . objects in England as my executors . . . may in their . . . absolute discretion select . . .

He makes it quite plain, when he is giving it to institutions, that at any rate the institutions are to be charitable institutions. In the next clause, he says:

> . . . the receipts of the treasurer or other proper officer for the time being of any hospital home or other institution shall be a sufficient discharge . . .

When he says that, it is quite plain that the word "institution" in that clause quite clearly has reference only to such institutions as are charities, because he has given them to "such charitable institution." If there were not inserted into this clause the words "or benevolent," there could be no possible argument, of course, and this gift would be a perfectly good gift. It would be a gift devoted wholly to charitable objects, to which no possible objection could be made.

It is said that the insertion of these words "or benevolent" renders the whole gift invalid, so that no effect can be given to the gift at all, and that the very large residuary estate which the testator had originally left (after making provision for the other dispositions of the will) will go, not, as the testator intended it to go, for the good of the public in certain particular branches, but for the good of a limited number of people who apparently were not in touch with the testator at all.

In those circumstances, am I constrained so to read the words "or benevolent" as to defeat what I am quite clear in my own mind was the intention of the testator? I do not think that I am constrained by authority to take that course. I think that in this case I am construing this particular will, and, construing it on the language which the testator has used, I think that the testator has shown quite clearly a definite intention to benefit charities in the proper sense of the word. His desire was that his very large residue should be distributed by his executors among institutions and hospitals and such like, for the benefit of those institutions. Those particular institutions show a good charitable intention, and when, it may be by a slip, the word "or" was inserted between the word "charitable" and the word "benevolent," the testator did not, in my judgment, intend so to extend, and has not, in this particular case, so extended, the scope of his bounty as to bring within the ambit of the powers of the executors objects which are not charitable, because the overriding intention of this will is that only those objects which are charitable in the strict legal sense are to benefit.

In my judgment, the words "or benevolent" are not sufficient here to control what, in my view, was the overriding intention to benefit charities, and the fact that in other cases those words "or benevolent" have been held to control the general meaning of the intention does not, in my judgment, prevent my coming to that conclusion, because it really only comes to this. In other cases where the words "or benevolent" have been construed, the courts have come to the conclusion that the intention of the testator was, not to limit his bounty to charity in its legal sense, but to give a discretion to apply his residue, or the gift in question, not only to charitable objects, but that objects which may be not charitable may fall within it. If that was the intention of the testator in this case, I should come to the same conclusion as was reached in those other cases, but, once I come to the conclusion that, when the testator came to cll. 5 and 6 of his will, he had definitely turned his mind to disposing of his property for charitable purposes, then I think that that is an overriding intention which governs the whole purpose and object of the gifts given in cll. 5 and 6, and is sufficient to enable me to say that in this particular case the gift of the residue is not an invalid gift, and does not fail, but does operate as a good charitable gift.

Declaration that the disposition of the testator's residuary estate is a valid charitable gift. No order as to costs, counsel on behalf of the charities undertaking that the Attorney-General's costs should be provided for.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the plaintiffs); A *White & Leonard* (for the next of kin); *Thomas Eggar & Son* (for the charities); *Field, Roscoe & Co.*, agents for *Stapley & Hurst*, Eastbourne (for Johnson); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

B

SMITH *v.* COX.

[King's Bench Division (Humphreys, J.), **June 27, 28, 1940.**]

Distress—Illegal distress—Non-payment of rent by tenant—Agent paying sum equivalent to rent to landlord—Whether rent paid. C

The landlady of certain premises being poor, in bad health, and of advanced age, the agent who collected her rents was in the habit, when a tenant failed to pay his rent, of rendering accounts to her just as if the rent had been paid. On one occasion, when the tenant owed £260, which had in fact been paid to the landlady by the agent, the agent, who was a certificated bailiff, levied a distress for the rent. D At the time when the distress was levied, the tenant recognised that he owed the money, but stated that he thought he was entitled to refuse payment because the landlady had not done certain repairs. It was contended that, in the circumstances, the rent had been paid and that the distress was illegal:—

Held: the agent did not intend the payment to be made on behalf E of the tenant, and did not have the tenant's prior authority to make the payment, nor was the payment subsequently ratified by the tenant. In the circumstances, the distress was not illegal.

[**EDITORIAL NOTE.** There are two distinct liabilities in the case of rent. The principal debtor is the land, and the other liability arises under the tenant's covenant. The right of distress lies in respect of the land's liability only, as is shown by the F fact that, in the case of assignment, the land remains liable to distress, while the original lessee remains liable on his covenant. The latter liability is not enforceable by distress. Consequently, if rent is to be received as such, it must be received from the land, and it was contended by the plaintiff that the liability of the land could be discharged by a stranger without proof of agency. This contention has not found favour with the court, however. G

As to When Distress may be Levied, see HALSBURY, Hailsham Edn., Vol. 10, pp. 477-481, paras. 611-617; and for Cases, see DIGEST, Vol. 18, pp. 308-314, Nos. 440-495.]

Case referred to:

(1) *Simpson* v. *Egginton* (1855), 10 Exch. 845; 12 Digest 448, *3625*; H 24 L.J. Ex. 312.

Action for damages for wrongful distress. The facts are fully set out in the judgment.

R. J. White for the plaintiff.

Gilbert J. Paull, K.C., and *B. H. Waddy* for the defendant.

HUMPHREYS, J.: The plaintiff claims damages for wrongful distress. The distress in question was levied by the defendant on certain property let to the plaintiff by Miss Rolfe, for whom the defendant acted as agent. The defendant unquestionably levied the distress because he believed that the plaintiff had not paid his rent for a very long time. The plaintiff A admitted that he owed the rent, and he made no difficulty when a man was put in possession, except to say that the time was inconvenient, as he was having a sale on the premises. He paid the amount next day, less an agreed allowance in respect of certain repairs which had not been carried out by the landlady.

B The defendant thought that he was entitled to refuse to pay the rent because the landlady had not carried out the repairs. It was not contended that he was right in that, but the defence was founded on the following facts. The landlady was a woman of 79 years of age, poor, and in bad health, and to a great extent she was dependent on this rent. C When the plaintiff failed, as he consistently did, to pay his rent, the defendant, who was a friend of the landlady's, was in the habit of paying her a sum equivalent to the rent and of rendering accounts to her just as if the rent had been paid. When the plaintiff did in fact pay the rent, the defendant reimbursed himself to the extent of the amount which he D had advanced to the landlady.

It has been argued for the plaintiff that, if a stranger pays the rent of the tenant to the landlord and the landlord accepts it, that is a good payment. It would not be so if the payment were made in respect of any other sort of debt, but, it was contended, in the case of rent, it was E sufficient. In support of this, a passage from COKE UPON LITTLETON, 18th Edn., p. 206*b*, is relied upon:

> But if a stranger of his own head, who hath not any interest, etc., will tender the aforesaid money to the feoffee [the person who would now be the landlord] at the day appointed, the feoffee is not bound to receive it.

F On the words "the feoffee is not bound to receive it," Sir Edward Coke makes this note:

> And note that Littleton saith, that he is not bound to receive it at a stranger's hand. But if any stranger in the name of the mortgagor or his heir (without his consent or privity) tender the money, and the mortgagee accepteth it, this is a good satisfaction. . . .

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Counsel for the defendant drew my attention to the words "in the name of the mortgagor" (here the tenant) as being part of the statement of the law, and I find a further statement of the law by PARKE, B., in *Simpson* v. *Egginton* (1), at p. 847:

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> The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor . . . appears to be, that it is not sufficient to discharge a debtor unless it is made by the third person, as agent, for and on account of the debtor and with his prior authority or subsequent ratification.

I cannot find the smallest evidence in this case that, either as between himself and the landlady or as between himself and the plaintiff, the defendant was acting, or purporting to act, or regarding himself as acting, as the agent of the plaintiff. The defendant was doing no more than advancing out of his own pocket money which he did not desire that the landlady should be deprived of for any long time, and was taking the risk of being able to recoup himself later on. That being so, the action must fail, because it is founded on an illegal distress based on the fact that the A plaintiff had paid his rent or that someone had paid it for him. Nobody had intended to pay his rent, or had purported to do so. The action must be dismissed with costs.

Action dismissed with costs.

Solicitors: *W. R. Perkins* (for the plaintiff); *Joynson-Hicks & Co.* B (for the defendant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NOKES *v.* DONCASTER AMALGAMATED COLLIERIES, LTD

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Romer and Lord Porter), **June 4, 5, 6, August 1, 1940.**]

Companies—Winding up—Dissolution—Transfer of property, rights and liabilities to another company—Contract of personal service—Companies Act, 1929 (*c.* 23), *s.* 154.

Master and Servant—Written contract of personal service—Dissolution of employer company and transfer of property, rights and liabilities to another company—Whether contract of service between employee and transferee company—Companies Act, 1929 (*c.* 23), *s.* 154.

In Jan., 1937, the appellant entered into a written contract of service with a colliery company to serve the company as a coal-miner at their colliery. No notice to terminate the contract was ever given to or by the appellant, and the appellant did not thereafter enter into any written contract of service with any other person or company. On June 4, 1937, an order was made under the Companies Act, 1929, s. 154, transferring to the respondent company the property, rights and liabilities of the colliery company, which was dissolved under sect. 153 of the Act. The order was duly published as directed by the court, but did not in fact come to the notice of the appellant. The appellant duly worked at the colliery until Oct. 7, 1937, and received his wages, which were paid weekly by the respondent company as from June 4, 1937. On Oct. 7, 1937, the appellant absented himself without cause from his work at the colliery, and the respondent company sustained a loss of not less than 15*s.* in consequence thereof. The appellant was charged under the Employers and Workmen Act, 1875, s. 4, with having wrongfully absented himself from, or neglected, the service of the respondent company, who claimed the sum of 15*s.* for damages for breach of contract. Between the date of the issue of the summons and the date of the hearing before the justices, the appellant continued to work for, and receive wages from, the respondent company. The justices found that there had been a breach of contract, and ordered the appellant to pay the damages claimed and costs. Thereupon this appeal was brought, and the appellant contended, *inter alia*, that no contract of service existed between him and the respondent company, and that the order of the court, dated June 4, 1937, could not, and did not, effect a transfer of a contract of personal service, which by law was incapable of assignment :—

HELD (LORD ROMER *dissenting*) : an order made under the Companies Act, 1929, s. 154, does not automatically transfer contracts of personal service, which are in their nature incapable of being transferred, and a contract of service did not, therefore, exist between the appellant and the respondents.

per VISCOUNT SIMON, L.C. : the word " contract " does not appear in the section at all, and I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company.

Decision of Court of Appeal ([1939] 2 All E.R. 668) *reversed.*

[**EDITORIAL NOTE.** It is a general rule that contracts of personal service contemplate that the person employed has been selected with reference to his individual skill, competency or other qualification, and it is, therefore, of the essence of the contract that the contracting party is entitled to personal performance, and, in default thereof, is entitled to treat the contract as at an end. By reason of this rule, it has been said that contracts of personal service are not assignable, and it is here held that the assignment of contracts of personal service is not included in a general assignment of all the property of a company about to be dissolved to a new company formed for the purpose of taking over the business of that company.

As to Assignability of Contracts, see HALSBURY, Hailsham Edn., Vol. 7, pp. 308-310, para. 431; and for Cases, see DIGEST, Vol. 12, pp. 592, 593, Nos. 4930-4933.]

Cases referred to:

(1) *Farrow* v. *Wilson* (1869), L.R. 4 C.P. 744; 12 Digest 593, *4935*; 38 L.J.C.P. 326; 20 L.T. 810.

(2) *Brace* v. *Calder*, [1895] 2 Q.B. 253; 34 Digest 104, *776*; 64 L.J.Q.B. 582; 72 L.T. 829.

(3) *Re General Rolling Stock Co., Chapman's Case* (1866), L.R. 1 Eq. 346; 9 Digest 536, *3528*.

(4) *British Waggon Co.* v. *Lea* (1880), 5 Q.B.D. 149; 12 Digest 589, *4911*; 49 L.J.Q.B. 321; 42 L.T. 437.

(5) *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900)* v. *Tolhurst*, [1902] 2 K.B. 660; 8 Digest 424, *29*; 71 L.J.K.B. 949; 87 L.T. 465; *affd.* on other grounds, [1903] A.C. 414.

(6) *Griffith* v. *Tower Publishing Co., Ltd., and Moncrieff*, [1897] 1 Ch. 21; 12 Digest 590, *4916*; 66 L.J.Ch. 12; 75 L.T. 330.

(7) *Leach* v. *R.*, [1912] A.C. 305; 42 Digest 708, *1251*; *sub nom. Leach* v. *Public Prosecutions Director*, 81 L.J.K.B. 616; 106 L.T. 281; *revsg.* S.C. *sub nom. R.* v. *Acaster, R.* v. *Leach*, [1912] 1 K.B. 488.

(8) *Portland (Duke)* v. *Baird & Co.* (1865), 4 Macph. (Ct. of Sess.) 10; 31 Digest 382, case *a*.

(9) *Midland Counties District Bank, Ltd.* v. *Attwood*, [1905] 1 Ch. 357; 9 Digest 536, *3531*; 74 L.J.Ch. 286; 92 L.T. 360.

(10) *Reigate* v. *Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 9 Digest 536, *3532*; 87 L.J.K.B. 724; 118 L.T. 479.

(11) *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 29 Digest 287, *2339*; 63 L.J.P. 146; 71 L.T. 346.

(12) *Bank of South Australia* v. *Abrahams* (1875), L.R. 6 P.C. 265; 10 Digest 734, *4590*; 44 L.J.P.C. 76; 32 L.T. 277.

(13) *Re Patent Ivory Manufacturing Co., Howard* v. *Patent Ivory Manufacturing Co.* (1888), 38 Ch.D. 156; 10 Digest 734, *4592*; 57 L.J.Ch. 878; 58 L.T. 395.

Appeal from an order of the Court of Appeal (Sir Wilfrid Greene, M.R., Finlay and du Parcq, L.JJ.), dated May 5, 1939, and reported [1939] 2 All E.R. 668, affirming an order of the Divisional Court, dated Oct. 13, 1938, and reported [1938] 4 All E.R. 6, dismissing an appeal by way of case stated against a decision of the justices for the county of York. The facts and the arguments are set out in the opinions of their Lordships.

John W. Morris, K.C., and *G. Granville Sharp* for the appellant.

H. Wynn Parry, K.C., and *H. B. H. Hylton-Foster* for the respondents.

Viscount Simon, L.C.: My Lords, the question to be decided in this appeal can be thus stated. When the court makes an order under the Companies Act, 1929, s. 154, transferring all the property and liabilities of the transferor company to the transferee company, is the result that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between the individual and the transferee company ?

The appellant is a coal-miner, and between Jan., 1937, and June 4, 1937, there existed between him and the Hickleton Main Colliery Co., Ltd., a contract under which he worked at the colliery and received wages from that company. On June 4, 1937, an order was made by the Chancery Division of His Majesty's High Court of Justice under sect. 154, which transferred to the respondent company all the property, rights, powers, liabilities and duties of a number of colliery companies, including the Hickleton Main Colliery Co., Ltd., and which provided that these transferor companies should be dissolved without winding up. The appellant continued to work at the Hickleton Main Colliery until Oct. 7, 1937, and received wages from the respondents for his labour, but throughout he believed himself to be working under his contract with the Hickleton Main Colliery Co., Ltd., which contract had never been terminated by notice. The company, however, as the result of the order made by the Chancery Division, had ceased to exist. On Oct. 7, 1937, the appellant absented himself from work, in circumstances which would have made him liable under the Employers and Workmen Act, 1875, s. 4, if he could be regarded as under a contract of service with the respondents. This he denied, and hence, on a case stated by the justices of Doncaster the general question arises which I have defined above, and which the House has now to determine.

Counsel for the appellant argued that a contractual right to personal service was a personal right of the employer, and was incapable of being transferred by him to anyone else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is indisputable, of course, that, apart from statutory provision to the contrary, the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A and X would have to be terminated by notice or by mutual consent and a new contract of service entered into by agreement between A and Y. The rule is so strict that, if the contract is between individuals on both sides and X dies, the contract of service is immediately dissolved (*Farrow* v. *Wilson* (1), at p. 746), for A never promised to serve X's personal representative and X could only act as employer when alive. Where a firm consisting of 4 partners engaged the plaintiff as manager for a term of 2 years, the retirement of two partners from the firm within that period operated as a wrongful dismissal of the plaintiff : *Brace* v. *Calder* (2). If A's contract is to serve a limited company, X & Co., and X & Co. goes into liquidation, the winding up order operates as a notice of discharge to the servants of the company : *Re General Rolling Stock Co., Chapman's Case* (3).

The rules of law restricting the assignability of contracts are, however, by no means limited to contracts of personal service. In the case of contracts for the sale of goods, for example, unless the contract expressly or by implication covers the purchaser and his assigns, the seller is entitled to rely on the credit of the purchaser and to refuse to recognise any substitute. Similarly, the purchaser is entitled to rely upon the seller and to hold him responsible for due performance. I may add that a possible confusion may arise from the use of the word "assignability" in discussing some of the cases usually cited on this subject. Thus, in *British Waggon Co.* v. *Lea* (4), the real point of the decision was that the contract which the Parkgate Waggon Co. had made with Lea for the repair of certain wagons did not call for the repairs being necessarily effected by the Parkgate Waggon Co. itself, but could be adequately performed by the Parkgate Waggon Co., arranging with the British Waggon Co. that the latter should execute the repairs. Such a result does not depend on assignment of contract at all. It depends on the view that the contract of repair was duly discharged by the Parkgate Waggon Co. by getting the repairs satisfactorily effected by a third party. In other words, the contract bound the Parkgate Waggon Co. to produce a result, not necessarily by its own efforts, but, if it preferred, by vicarious performance, through a subcontractor or otherwise.

A quite different situation, as it seems to me, is illustrated by *Tolhurst* v. *Associated Portland Cement Manufacturers* (*1900*) (5), and, with all respects to an observation made by LORD LINDLEY at the end of his judgment in *Tolhurst's* case (5), I doubt whether *British Waggon Co.* v. *Lea* (4) was really an authority very much in point. In *Tolhurst's* case (5), the majority of this House took the view that the contract then under discussion was "assignable," because the contract ought to be read and construed as one between the named parties and their respective assigns, although assigns were not in fact mentioned in the document. By so construing the agreement, the validity of the transfer of the benefit of the contract from the original company to the new company to which it assigned it, became unchallengeable, and LORD MACNAGHTEN insists, at p. 147, that, once the true interpretation of the contract is settled, there is no further legal point in the case at all. *Tolhurst's* case (5), therefore, was a case in which the terms of the contract provided for its assignment. The *British Waggon Co.* case (4) does not turn on assignment, but illustrates the circumstances in which the original contracting party may perform the contract by getting somebody else to do the work in satisfactory fashion.

It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law—namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent. The whole question, however, is whether the Companies Act, 1929, s. 154, provides a statutory exception to that principle. In favour of the view that it does, it is pointed out that the only transfers which the section can authorise are transfers of the undertaking of one company to another, and that, if the employer is a company, the servant can have no direct contact with the artificial entity, but of necessity deals with, and acts under, the orders of the company's agents. Moreover, the change involved in a wage-earner serving the new company in place of the old is, in normal cases, no greater than the change he would experience when the company which he is serving throughout changes its directors, its shareholders, its managers, its scope of operations, and its name, all of which it may do without losing its identity. No doubt this is true in many cases, though I am far from saying that the transformation of a small private or family company, in which the wage-earner maintains a personal relation with the principal shareholders, who act as managers and directors, into a much larger concern, where personal contacts disappear, is in all cases a matter of indifference to the employees, but the point made is that such a transformation can take place without necessarily changing the identity of the company.

It is further argued on behalf of the respondents that sect. 154 constitutes a new and simpler machinery for the transfer of the undertaking of an old company to a new company, which thus acquires the undertaking without the necessity of the transferor company going into liquidation. As SIR WILFRID GREENE, M.R., observed in his judgment, the word "transfer" is not a word of art, and the language of sect. 154 is in very wide terms. Moreover, sect. 154 contemplates—or, at any rate, provides for—the dissolution of the transferor company when the transfer of its undertaking has been made, and there appears to be no means of calling back to life the company so dissolved, for sect. 294 occurs in Part V of the Companies Act, 1929, dealing with winding up, whereas sect. 154 is found in Part IV.

In these circumstances, and with powerful arguments presented on either side, the House is left with the difficult task of putting the proper construction on sect. 154, so far as its application to current contracts of service is concerned. I give full weight to the unanimity of view expressed in the courts below by judges, some of whom speak with special authority on this sort of subject-matter, but, after much reflection, and after weighing the reasoning in those judgments and the arguments presented at the bar of this House, I have come to the conclusion that contracts of personal service are not automatically transferred by an order made under sect. 154. The principles of construction which apply in interpreting such a section are well-established. The difficulty is to adapt well-established principles to a particular case of difficulty. The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but, where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

Here, the wider interpretation of sect. 154, which has found favour in the courts below, practically amounts to saying, in reference to current contracts of the transferor company, that an order made under sect. 154 strikes out the name of the transferor company and substitutes that of the transferee company as a party to the contract. Consequently, all current contracts of service are transferred, without consulting the servant, by substituting the new employer for the old. However, it is fallacious to suppose that this wide construction of sect. 154 would remove all difficulty in transferring contracts for personal service. If, for example, one of the companies to be amalgamated under the procedure of that section has a long-term contract with an individual to be sole manager of its undertaking, what would happen when the transfer takes place to a new and enlarged company ? The remuneration may be quite inadequate, or the individual may be quite unsuited, for so extended a responsibility. Again, if each of half-a-dozen amalgamating companies has such a contract with its manager, the suggested interpretation of sect. 154 appears to lead to absurdity. The truth is that many contracts are not capable of being dealt with by the method said to be involved in the language of sect. 154. For example, what would become of a contract which remunerates a manager with a share of the profits of a constituent undertaking, or a contract with a medical man to attend the servants of a company at a fixed total fee ? Such contracts cannot be dealt with simply by substituting a new employer for the old, for the nature of the contract necessarily depends upon the old employer continuing to be a contracting party, and any change of employer gives the contract an entirely new meaning.

It seems to me, therefore, that any difficulties arising in connection with such contracts as I have described above must be disposed of at the time of transfer by negotiation leading either to a new engagement or to compensation. If this is so, it is no longer possible to give to sect. 154 an interpretation which would automatically transfer every kind of current contract merely by substituting the name of the new company for the name of the old. The argument that an order made under the section transfers wage-earners from one employer to another without their consent thus loses much of its force. I do not see why there should be any great practical difficulty in the old company announcing to its workpeople that the undertaking is about to be transferred to a new company, giving the necessary notice to terminate existing engagements, and informing the wage-earners that the new company is prepared to re-engage them on the same terms, and that continuing service after such a date will be taken as acceptance of the new offer. At any rate, after examining sect. 154 with close attention and considering the consequences of its application in different cases, I can come to no other conclusion than that an order made under it does not automatically transfer contracts of personal service. The word " contract " does not appear in the section at all, and I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company. Such a right cannot be the subject of gift or bequest. It cannot be bought or sold. It forms no part of the assets of the employer for the purpose of administering his estate. In short, sect. 154, when it provides for " transfer," is providing, in my opinion, for the transfer of those rights which are not incapable of transfer, and is not contemplating the transfer of rights which are in their nature incapable of being transferred. I must make it plain that my judgment is limited to contracts of personal service with which the present appeal is concerned. It may well be that current contracts for the supply and purchase of goods are subject to what I may call a statutory novation, except contracts for the supply of " your requirements " or the like, which, like contracts to obey " your orders," do not seem to me capable of automatic transfer.

The conclusion at which I have arrived may be regarded as limiting the usefulness of the section, but to that consideration there are two answers. In the first place, I am not justified on that account in giving to the section a wider effect than its true interpretation should provide, and there must be great advantages in avoiding the necessity of liquidation and in effecting transfers without any further act or deed in cases contemplated by the section. In the second place, if the legislature really desires that workmen shall be transferred to a new employer without their consent being obtained, plainer words can be devised to express this intention. I cannot regard sect. 154 as plainly authorising this result, and, in my view, the appeal should be allowed, with costs here and below, and the question of law raised in the case stated should be answered by saying that a contract of service did not exist between the appellant and the respondents, and that the magistrates should dismiss the summons, with such order as to costs as they think fit.

LORD ATKIN [read by LORD WRIGHT]: My Lords, this is an appeal from an order of the Court of Appeal dismissing an appeal from a Divisional Court who dismissed an appeal from an order of the justices at the petty sessions held at Doncaster in and for the division of Lower Strafforth and Tickhill. The case came before the justices on a summons preferred by the Doncaster Amalgamated Collieries, Ltd., against the appellant under the Employers and Workmen Act, 1875, s. 4. The summons, which was dated Oct. 16, 1937, claimed 15*s.* for damages for breach of contract, alleging that the defendant wrongfully absented himself from, or neglected, the service of the plaintiffs at their Hickleton Colliery on Oct. 7, 1937. The justices adjudged that the defendant pay the sum of 15*s.* damages and 10*s.* costs. The Act gives the justices jurisdiction in disputes between an employer and a workman when the claim does not exceed £10, and by sect. 10:

> . . . workman . . . means any person who, being a . . . miner . . . has entered into or works under a contract with an employer, whether the contract . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

The defence of Nokes was that he had no contract with the respondents. He had been an employee of the Hickleton Main Colliery Co., Ltd., and on Oct. 7 he had never heard of Doncaster Amalgamated Collieries, Ltd. To that the answer was that that might be, but, by an order made in the Chancery Division on June 4, 1937, under the Companies Act, 1929, s. 154, all the property, rights and liabilities of the Hickleton Main company had been transferred to the respondent company, and included in them was the contract of service with Nokes, so that from that date he had become without his knowledge the servant of the respondent company. I do not refer to the facts found by the justices in the case stated, but it is clear from the case that Nokes had on Oct. 7 no knowledge of any proposed change in his employers, and that the question of law for determination is whether the order made on June 4 had the effect *ipso facto* of creating a contract of service between Nokes and the respondent company.

My Lords, I confess it appears to me astonishing that, apart from overriding questions of public welfare, power should be given to a court or to anyone else to transfer a man without his knowledge, and possibly against his will, from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf. If Parliament has so enacted, however, the result must be accepted. I venture to think, however, that the effect of the legislation is far different from what it is supposed to be by the 6 judges who have dealt with the matter in the courts below. The problem arises under two sections in the Companies Act, 1929—namely, sects. 153, 154, which, with sect. 155, form a small division of the Act entitled "arrangements and reconstructions," which, modifying and replacing sects. 45 and 120 of the Act of 1908, provide for compromises between a company and its members or creditors, and also provide for arrangements in the nature of reconstruction or amalgamation. Sect. 154 was introduced for the first time into the Companies Act, 1928, by sect. 54, and so found its way into the consolidating Act of 1929. The sections come into play in the following way. The Hickleton Main Colliery Co., Ltd., was a company working its pits in Yorkshire. In Jan., 1937, Nokes entered into a written contract of service with the company to serve it as a miner on the terms and conditions appearing in the byelaws in force at the company's collieries, and the company by this agreement agreed to engage Nokes on the same terms and conditions. The contract was in writing constituted by Nokes's signature to the contract book. At some time before June, 1937, the company, together with 6 other colliery companies, proposed an arrangement for amalgamating all the companies with a new company to be formed or then formed—namely, the Doncaster Amalgamated Collieries, Ltd.—and, as part of the scheme, agreed with each other and with that company to transfer their property, rights and liabilities to the new company. I have to rely upon my recollection of the agreement, which was produced at the hearing by counsel for the respondents, but I think that the new company were parties to the formal agreement. Application was made to the court under sect. 153 for the approval of this scheme, and the scheme was duly sanctioned by CROSSMAN, J., on Mar. 22, 1937. By an order, dated June 4, 1937, made by CROSSMAN, J., on an originating summons, dated Apr. 23, 1937, issued by the Doncaster Amalgamated Collieries, Ltd., it was ordered that all the property, rights and powers of four of the amalgamating companies, including the Hickleton Main Colliery Co., Ltd., as specified in the schedule, and all other the property, rights and powers of the transferor companies, be transferred without further act or deed to the transferee company, and that the same should vest in the transferee company for all the estate and interest of the transferor companies therein. It was further ordered that all the liabilities and duties of the transferor companies should be transferred to the transferee company without further act or deed, and, accordingly, the same should, pursuant to the Companies Act, 1929, s. 154 (2), be transferred to, and become the liabilities and duties of, the transferee company. It was further ordered that all proceedings now pending by or against the transferor companies be continued by or against the transferee company, and that the transferor companies should deliver an office copy of the order to the Registrar of Companies, and that, on such delivery, the transferor companies should be dissolved. This order follows very closely the terms of sect. 154. The contention is that the effect of the section is to transfer all rights which a transferor company had against anyone at the date of the order, whether on personal contracts or on contracts expressed to be non-assignable, or on property the rights in which ceased on assignment. In other words, rights not transferable in law or equity were in fact transferred, if necessary against the will of the parties against whom the rights existed, and in confiscation of the rights which those parties had reserved to have dealings only with the person—i.e., the transferor company—with whom they had elected to be associated. It means that contracts of service are compulsorily altered, and new contracts of service with a new employer created, without the consent of one of the contracting parties. It is not, of course, confined to weekly or fortnightly contracts. It extends in the case of collieries to the longer term contracts of accountants, managers, salesmen, solicitors, doctors, and apparently—though how this would be applied where the company is dissolved is not explained—to managing directors engaged for a term of years. It applies to other personal contracts, such as those to write a book or a play, or produce a film, or paint a picture. It covers property held without the right of assignment. In England, in the case of leases, it would forfeit the right reasonably to withhold consent. In Scotland, as I understand it, it would invalidate any condition based on law or contract of non-assignability. It would convey personal rights of action, as, for instance, a right to sue for defamation. It would transfer shares in companies which, by their constitution, allowed the directors a discretion as to the shareholders they admitted to their register. As I understood the argument, the transferee company was entitled by the order to be registered in respect of such shares.

When one regards the remarkable legal consequences of the construction adopted by the courts below, one is driven to ask what the reasons may be supposed to be which brought about this revolution in the law, and which led to one class of person—namely, companies under the Companies Act—being able to shake off the restrictions which bind ordinary persons, though only when they are minded to transfer their business to another, and probably a larger, company. Before 1928, no such privilege existed. Amalgamations, a vague term, were possible. Companies could dispose of their undertaking to other companies, but it was necessary to invoke the machinery of a winding up. Assets would be transferred by conveyances to which the liquidator was party. Assignments had to be negotiated, and dissolution of the company could not take place until after the winding up had been completed. However, all such sales of undertakings were subject to the ordinary law, and had, of course, to respect the rights of third parties. Nothing was transferable by a company which was not transferable by an individual, and, in particular, no one suggested that contracts of service could be transferred. On the contrary, a winding up order or resolution operated as a discharge of existing servants, resulting in the right to claim damages for wrongful dismissal. It is true that the transferee company would ordinarily offer to employ the former servants of the transferor company, and an unreasonable refusal to accept such offer would mitigate, or perhaps get rid of, any damages, but the servant was left with his inalienable right to choose whether or not he would serve a new master.

The new procedure operates to remove much of the complexity of the former system. An arrangement can be made for transfer of an undertaking by way of amalgamation without incurring the necessity of a winding up. Once a winding up is avoided, there is no longer a liquidator to control the transfer, and, by the old device of a vesting order, property which previously had to be conveyed can be transferred, as the order in the present case says, without further act or deed. A further change is made. Under the former law, a company could only be dissolved after the winding up had been completed, which involved delay until its liabilities had been met or compromised, either by arrangement with the new company —i.e., a novation—or by taking an indemnity from the new company, realising or reserving assets sufficient to meet the liabilities. However, as there is to be no winding up under the new system, there was to be a special power of dissolution. This is given by sect. 154 (1) (*d*), but no time is fixed for dissolution. It need not be ordered at all, or, if ordered, can be postponed for any period which the judge may deem necessary. One other change is necessary. As the assets are to be vested in the new company, and as an early dissolution is in most cases anticipated, it is plain that the liabilities of this transferor company have to be provided for. Otherwise, the transfer of the assets would very much resemble a fraudulent conveyance. This is dealt with by making the new company take over, and so be responsible for, the liabilities of the old. There has thus been provided a much more rapid mode of carrying out a reconstruction or amalgamation which avoids a winding up, an improved procedure akin to the various modern conveyancing provisions made in other statutes. However, why this beneficent procedure should be tainted with the oppression and confiscation which in some cases would certainly be caused, or why, in the interests of companies big or small, for the mere purposes of an amalgamation, it should violate all the rules as to transferability, depending on some occasions on principles of our law and on other occasions on contract, I cannot imagine. It is said that one company does not differ from another, and why should not a benevolent judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is twofold. The first is that, however excellent the new master may be, it has hitherto been the servant who has had the choosing of him, and not a judge. The second is that it is a complete mistake, in my experience, to suppose that people, whether they are servants, or landlords, or authors, do not attach importance to the identity of the particular company with which they deal. It would possibly hurt the feelings of financial men with large organising powers and ambitions to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns. However, it is said how unreasonable this is, for the big company can buy the majority of the shares in the old company, replace the directors and managers, change the policy and produce the same result. Be it so. Nevertheless, the result is not the same. The identity of the company is preserved, and, in any case, the individual concerned, while he must be prepared to run the one risk, is entitled to say that he is not obliged to run the other. The truth is that this argument was tried out and repelled over 40 years ago by Stirling, J., in *Griffith* v. *Tower Publishing Co., Ltd., and Moncrieff* (6), where an author was held justified in refusing to allow his contract to be transferred to another company. The judgment is very apposite to the present case. After deciding that there is no difference between publishing contracts with an individual and publishing contracts with a company, so far as assignability is concerned, the judge said, at p. 24:

> No doubt part of the inducement was also that the company had a very efficient manager. It was said that the company might have discharged him the next day without giving the plaintiff cause to complain. That observation is well-founded. The company might have discharged its manager the next day, and appointed new officers at any time; but still the plaintiff might well act on the assumption that the Tower Company and those who directed its affairs would select a manager who would maintain the reputation of the company. It seems to me that it would be wrong to draw any such distinction as is suggested between an agreement entered into by an author with an individual publisher and a similar agreement between an author and a limited company; and agreements of the former kind being non-assignable, I hold that agreements of the latter description are also incapable of being assigned.

Much stress has been laid on the general words in the definition clause in sect. 154 (4):

> In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

However, it has been the duty of the court on countless occasions to construe general words cutting down the generality to the obvious intention of the legislature. The words of Maxwell on the Interpretation of Statutes, 8th Edn., p. 73, appear to me to afford a true canon of construction. After saying that there are certain objects which the legislature is presumed not to intend, and that a construction which would lead to any of them is, therefore, to be avoided, the author continues as follows, at p. 73:

> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law.

He proceeds to illustrate this principle by instances which occupy several of the succeeding pages. I will cite only one application, *Leach* v. *R.* (7). The Criminal Evidence Act, 1898, had made the wife of an accused person a competent witness for or against him on charges of certain scheduled offences. The question arose on appeal to this House whether she was thereby made a compellable witness. The House, reversing the Court of Criminal Appeal, said that she was not. The Earl of Halsbury said, at pp. 310, 311:

> You must consider, when you are dealing with Acts of Parliament, and examining what the effect of your proposed construction is, whether or not you are dealing with something that it is possible the legislature might either have passed by definite and specific enactment or have allowed to pass by some ambiguous inference . . . If you want to alter the law which has lasted for centuries and is almost ingrained in the English constitution, in the sense that anybody would say "To call a wife against her husband is a thing that cannot be heard of"—to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.

In the same case, Lord Atkinson said, at p. 311:

> The principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one such as the section relied upon in this case.

My Lords, I should have thought that the principle that a man is not to be compelled to serve a master against his will is just as deep-seated in the common law of this country as that which was under discussion in the case cited, and that here there is no clear, definite or positive enactment overturning it. In truth, however, the general words in this section describing "property" seem to me to add to the word "property" standing by itself nothing which would be taken by any lawyer to include property, rights and powers of any description. It is to be noticed that in the Companies (Consolidation) Act, 1908, s. 151 (2) (*a*), the liquidator in a winding up was given power:

> To sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels . . .

This power is given in the same words in the Act of 1929 by sect. 191 (2) (*a*). It is beyond controversy that sect. 151 (2) (*a*) of the Act of 1908, in giving power to the liquidator to sell or transfer property, did not give power to sell or transfer non-assignable property, and the same construction must be given to the powers given by sect. 191 (2) of the Act of 1929. We should then have what appears to me to be the anomaly that, while the liquidator's power to transfer property in a winding up is limited to assignable property, the court's power in an amalgamation to transfer property extends to non-assignable property. I cannot think that this departure from observing the ordinary rights of property of third persons is even suggested, much less expressed in clear and unambiguous language. Indeed, when I consider that the court gets no power until it sanctions an arrangement made under sect. 153, which must rest on agreement, and that there is plainly no right in the parties to agree to transfer what they have no right to transfer, and that such agreement can give no legal or equitable rights to anyone, I am still further confirmed in my view. It was said how short and simple the procedure suggested was, and with what consternation practitioners in company work would view a reversal of the present decision. I am not satisfied that all company lawyers have taken the view which found favour below, and I am satisfied that the result which I favour will still allow very considerable advantages, and still be an improvement upon that system with which the company world did very well up to 1928. However, a speedy transfer of property from A to B and a short sharp dissolution of A, though certainly simple, does not necessarily do justice to A, and still less to third parties who had dealings with A. I am satisfied that this, in the main procedural section, should not be construed so as to transfer rights which in their nature are by law not transferable. I am of opinion, therefore, that the appeal should be allowed, with costs here and in the Court of Appeal and in the Divisional Court, and that, in answer to the case, the justices should be directed to dismiss the summons, with such order as to costs as they think fit.

Lord Thankerton: My Lords, I have had the privilege of considering the written opinions of my noble and learned friends Lord Atkin and Lord Romer. I find myself in agreement with the opinion of Lord Atkin, and regret that I feel bound to differ from the opinion of Lord Romer, as also from the decision of both courts below. The decision of the appeal turns on the proper construction of the matters referred to in the Companies Act, 1929, s. 154 (1) (*a*):

> the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company . . .

and of sect. 154 (2), which provides as follows:

> Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to . . . and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

In subsect. (4) property and liabilities are defined in wide terms. The construction which has prevailed in the courts below clearly involves that the right which a third party would otherwise have to prohibit a transfer by the transferor company is at the mercy of the court under this section. That necessarily involves an extension of the rights of the transferor company and the corresponding extinction of a third party's rights. The remarks of the Earl of Halsbury in *Leach* v. *R.* (7), quoted by my noble and learned friend Lord Atkin, appear to me to be directly in point. The point which raises the difficulty is the word "transferred." If it had been intended to effect a substitution of the transferee company in room and stead of the transferor company, it would have been easy so to express it, but Parliament has not done so. This particular difficulty has not been mentioned or dealt with in the courts below, which appear to have been most impressed with the width of the definition of property and liabilities. I confess that the width of the definition does not impress me as favouring either construction, for, even if the word "transferred" had been qualified by such a phrase as "so far as transferable by the transferor company," the wide definition would have been equally necessary and appropriate. We are then left to a series of ingenious implications from other provisions in the section in order to give to the A word "transferred" a meaning which I do not consider to be its natural meaning. If it had been intended to extinguish the rights of third parties, that should have been done by a "clear definite and positive enactment not by an ambiguous one such as the section relied on in this case," as was said by LORD ATKINSON in *Leach's* case (7), at p. 311. I cannot B believe that this matter was considered by Parliament. Clearly, the main object of these provisions which were first introduced in the Companies Act, 1928, s. 54, was to facilitate the amalgamation of companies and to avoid the payment of duties on a whole series of deeds of transfer, etc.

C It cannot be gainsaid that the rights of third parties which would be overridden or extinguished by the respondents' construction are, in many cases, of material importance and value. I will add only one illustration to those instanced by my noble and learned friend LORD ATKIN. In the case of mineral leases, it has long been settled in Scotland that D a lease excluding assignees unless approved of by the landlord has the same force with an unqualified exclusion. The tenant has no right under such a clause to require the landlord to justify his refusal, neither, if he does assign a reason, is that subject to the review of the court: *Portland* (*Duke*) v. *Baird & Co.* (8). In *Portland* (*Duke*) v. *Baird & Co.* (8), E LORD JUSTICE-CLERK INGLIS, after referring to the *delectus personæ* involved in certain leases, says, at p. 18:

> But I think that both the clause and the subject with which we are dealing suggest a great many other considerations on the part of the landlord than the mere consideration whether a particular assignee or subtenant is an eligible man. It may in a mining district like this be at one time a very beneficial proceeding for the F landlord under such a lease to take an assignee, and to take an assignee of a particular character—an assignee or a subtenant who will work out the minerals very rapidly. It may at another time be his interest to receive no assignee at all, or only an assignee or subtenant whose command of capital, or whose enterprise, is not such as to be likely to produce a very rapid working-out of the minerals. There is a great competition and a great complication of interests in such a district. There are a great many things to be considered in the interest of a mineral proprietor besides the mere solvency or sufficiency of the tenants in his mineral leases; G and I should say it is difficult to understand that a landlord in making a lease of this kind should not have these interests in his eye when he arranges with his tenant under what conditions assignation or subtack is to be allowed. Can anything be more natural—or, I should say, more expedient—for the landlord, than that he should hold in his hand the power, not of rejecting this or that assignee or subtenant, but of determining absolutely, and with a view to his own wishes and interests only, whether at any particular time there shall be an assignation H or subtack at all?

In the absence of explicit provision to that effect, I am unable to find in the terms of sect. 154 anything to deprive the mineral landlord of such a right. Since writing this opinion, I have had the privilege of considering the opinion just delivered by my noble and learned friend VISCOUNT SIMON, L.C., and the opinion of my noble and learned friend

Lord Porter, with both of which I agree, as also in the motion proposed by Viscount Simon, L.C.

Lord Romer: My Lords, this appeal raises a general question of difficulty and importance as to the construction of the Companies Act, 1929, s. 154. It is the question whether the court has power under this section to transfer to, or vest in, the transferee company therein mentioned property and rights of a transferor company which the latter company is itself incapable of assigning, or which it can assign only with the consent of some third party whose consent to the transfer has not been obtained. The question more particularly involved is whether the order made on June 4, 1937, was effectual to transfer to the respondent company all the rights and liabilities of the Hickleton Main Colliery Co., Ltd., as they subsisted on that date, under and by virtue of the contract of employment entered into by the last-mentioned company with the appellant. In other words, was the appellant, as from June 4, 1937, in the employment of the respondent company upon the terms of such contract?

It is plain that the proper answer to be given to these questions can only be discovered after a careful and critical examination of the language employed in sect. 154. It is true that the section merely gives effect to an amendment of the law made by the Companies Act, 1928, s. 54, but that Act was passed for the purpose of amending the law relating to companies with a view to the consolidation of such law effected in the following year, and never itself came into force. In order, therefore, to appreciate the objects that the legislature had in view when making the amendment embodied in the section, it is necessary to consider how matters stood before 1929. For this purpose, it will suffice to consider an amalgamation of a company with another carried into effect by means of an arrangement made between each company and its shareholders under the provisions of the Companies (Consolidation) Act, 1908, s. 120, now represented by sect. 153 of the Act of 1929. The arrangement would provide for each company going into voluntary liquidation, and for the sale of the whole undertaking and assets of each company by its liquidator to a third company to be formed for the purpose of acquiring them. It would also provide that the purchasing company should undertake and indemnify the liquidators against the liabilities of the two amalgamating companies. The arrangements having been sanctioned by the court, and each company having gone into voluntary liquidation, the undertaking and assets of each company would be assigned to the new company by appropriate methods. Where any particular asset could only be transferred with the consent of some third party, it would be the duty of the liquidator of the transferring company to obtain that consent. Such an asset might consist of leasehold premises held subject to a covenant against assignment without the lessor's consent. I have never heard of a lessor's consent being refused in such a case, and it seems most unlikely that such a thing would occur in practice, but, if it did,

then, unless the covenant extended to parting with the possession of the demised premises, the difficulty might be got over by the transferor company executing a declaration of trust in favour of the new company, a step which would, upon the final dissolution of the transferor company, involve the appointment of a new trustee and a vesting order being
A made by the court under the provisions of the Trustee Act, 1925, ss. 41, 44. Any difficulty encountered in dealing with shares in another company which were subject to restrictions on transfer could be overcome in like manner, the vesting order in the new trustee being effected under sect. 51 of the last-mentioned Act.

B Another asset of the transferor company might be a trading contract for the purchase of the raw materials of its business. Unless it appears from the express terms of the contract, or by necessary implication, that it is to enure for the benefit of the assigns of the contracting parties, such a contract is not assignable at law: *Tolhurst* v. *Associated Portland*
C *Cement Manufacturers* (*1900*) (5). If, therefore, the new company were desirous of obtaining the benefit of the contract, the liquidator of the transferor company would do his best to obtain a novation of the contract by arrangement between himself, as representing the transferor company, the other party to the contract in question, and the new
D company. Failing this, the other party to the contract would be entitled to treat the sale of the transferor company's undertaking as a repudiation of the contract by that company, and prove in the liquidation for such damages as he might have suffered by reason of the repudiation. The contract, however, might be one which was essential to the success of
E the undertaking. In such a case, the parties to the scheme of amalgamation would, if there were any risk of failure to obtain a novation of the contract, have adopted an alternative scheme of arrangement, which is not an amalgamation in its strict sense, but is one for all practical purposes. The new company would not purchase the undertakings of the
F two companies in question, but would purchase the shares in those companies in consideration of the allotment to the shareholders of fully-paid shares in the new company. The two companies would not go into liquidation, but would continue in existence as going concerns, each carrying on business in its own name, but the management of its affairs
G and the control of its assets would be in the hands of the new company. Under such a scheme, there would, of course, be no transfer to the new company of any assets of the two amalgamating companies, but for every practical purpose the result would be the same as if every asset of those companies had been transferred, whether by deed, declaration
H of trust, novation of contract, or otherwise, for the scheme of arrangement with which I am contrasting a sale of the shares in the companies would have been dependent upon the sanction of the court being obtained, and such sanction would never be given to an amalgamation of a solvent company with one which was commercially insolvent, or concerning whose commercial solvency there was any reasonable doubt.

It remains to consider another class of contracts into which an amalgamating company may have entered—namely, contracts of service. So far as concerns its contracts with the more highly placed officials, there will not in practice be found any difficulty. Whether the amalgamation being negotiated is one to be effected by a transfer to the new company of the undertaking and assets of the amalgamating companies or by the purchase by the new company of the shares in those companies, one of the first things to be settled is who are to be the directors, managing directors, solicitors, auditors and so forth of the new company, or who are the persons who are to continue to occupy those positions in the amalgamating companies, as the case may be. Compensation for those who are displaced, sometimes on what may appear to be a generous scale, will be provided by the scheme of arrangement. All of this is an essential commonplace of such schemes. However, the contracts of service of those in a more humble situation, as, for example, those serving behind the counter in a shop, or those working underground in a colliery, whose services can usually be terminated by a comparatively short notice, will be left to the liquidator to deal with in the case of amalgamation proper, and will not need to be dealt with at all where the new company merely purchases the shares in the amalgamating companies. The making of an order for winding up by the court operates, no doubt, as a notice of dismissal of a company's employees, but this is not the result—or, at any rate, is not necessarily the result—of the passing of a resolution for voluntary winding up: *Midland Counties District Bank, Ltd.* v. *Attwood* (9) and *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (10). It would certainly not be the result of a voluntary liquidation of a company entered upon merely for the purpose of carrying through an amalgamation with another company by means of a sale of the company's undertaking and assets. In such a case, the liquidator would carry on the business as before, making use of the employees' services and paying their wages, until the time came for a transfer of the undertaking to the new company. The transfer would unquestionably operate as a notice of dismissal of the employees, and the liquidator, before making it, should in strictness take timely steps to determine the existing contracts of service and give the employees the opportunity of entering into fresh contracts with the new company. In practice, I suspect, he does no such thing, relying on the willingness of the employees to serve the new company, in spite of the fact that it may be governed by an entirely different lot of directors and managers, and may be carrying on business under an entirely different name, from those of the company whom he had contracted to serve. Such changes as these, however, might well occur in the case of his original employers. Directors and managers may come and go. The whole policy and methods of trading of his employers may be changed in the space of a very short time by a new body of shareholders obtaining control of the company. Its very name may be changed: see sect. 19 of the Act of 1929. Such changes as these must be expected by those who serve limited companies. The liquidator might well think, therefore, that an employee would not pay any regard to the fact that, after the transfer, he was serving a different legal entity, even assuming that the fact was one which he was capable of appreciating. The employee would serve and be paid by the new company in the same way as he had served and been paid by the old one. In such circumstances, a novation of his contract of employment would be readily implied. With the general creditors of the company the liquidator could take no risks. Except in so far as they might have become bound by the scheme of arrangement to accept other provisions, they would be entitled to be paid by the liquidator, and, until they had been paid, the liquidator could not hand over the assets to the new company, nor could the company be deemed to be dissolved under what is now sect. 236 of the Act.

It will be manifest from the foregoing observations that many months might elapse after the court had sanctioned an arrangement which provided for the amalgamation of two companies before the amalgamation would be "fully and effectively carried out." It was in these circumstances that the amendment of the law embodied in sect. 154 of the Act of 1929 was made.

Turning now to the section, the first thing to be noticed is that the court may by order provide for the dissolution of the transferor company without winding up, and that this order may be made at the same time as the order sanctioning the compromise. In the present case, the order providing for the dissolution of the Hickleton Main Colliery Co., Ltd., was not in fact made until nearly two-and-a-half months after the order sanctioning the arrangement. This, however, is immaterial. The important thing is that the legislature contemplated that the two orders might be made at the same time. It is plain that, until the arrangement is sanctioned by the court, there can be no transfer to the transferee company of the undertaking or property of the transferor company. It is equally plain that, if the dissolution of the transferor company takes place the moment the arrangement is sanctioned, there can be no transfer thereafter of such undertaking or property, whether by way of deed of assignment or declaration of trust or novation of contract or otherwise. The transferor company will have ceased to exist. The court has, no doubt, power under sect. 294 of the Act to declare the dissolution of a company "to have been void," but the section would seem to be applicable only to cases where the company has been in compulsory or voluntary liquidation and the dissolution has been effected under the provisions of sect. 221, sect. 236 or sect. 245. Under those sections, it is a condition precedent of dissolution that the affairs of the company have been completely or fully wound up, and, where, owing to some liability or some asset of the company having been overlooked, the condition precedent has not been fulfilled, the court can properly declare the dissolution "to have been void." Where, however, the court has, under sect. 154, brought about the dissolution of the company without a winding up, I can see no ground upon which the court could possibly thereafter declare such dissolution "to have been void." It is to be observed, moreover, that the order under sect. 294 is to be made upon an application by:

> . . . the liquidator of the company or by any other person who appears to the court to be interested . . .

Those words seem quite inapplicable to the case of a dissolution without a winding up. In these circumstances, I should expect to find in the section some provision for vesting in the transferee company the whole of the undertaking and assets of the transferor company, lock, stock and barrel, and I shall not have expected in vain, for, under subsect. (1) (*a*), the court is given power to make provision for the transfer to the transferee company of the undertaking, property and liabilities of the transferor company, and, by subsect. (2), the effect of making such provision is that the property thereupon becomes transferred to, and vested in, and the liabilities are transferred to, and become the liabilities of, the transferee company.

It is to be noticed that, by virtue of subsect. (4), the expression "property" includes property, rights and powers of every description. It includes, therefore, the rights of the transferor company under trading or service contracts, for the transferor company undoubtedly possesses rights under such contracts as well as liabilities, and such rights and liabilities become, by virtue of the order, transferred to and vested in the transferee company. Property passing by the order will also include assets which were only transferable by the transferor company with the assent of a third party, for such assets are property, notwithstanding any restrictions upon their assignability. I cannot, for myself, think of any item of a company's undertaking and assets which would not be covered by the expression "property, rights and powers of every description." If there were any, the court could vest them in the transferee company under the power, conferred upon it by subsect. (1) (*f*), of making provision for such incidental, consequential and supplemental matters as are necessary to secure "that the reconstruction or amalgamation shall be fully and effectively carried out." These words are of great importance. Of equal importance is the very remarkable provision contained in subsect. (1) (*c*). The court, apparently, under that provision, can, by the order which puts an end to the transferor company, enable the transferee company to continue *any* legal proceedings which have been instituted by or against the transferor company.

My Lords, the more closely I examine the section, the more I am convinced that the object of the legislature was to enable the court by an order to make a complete substitution of the transferee company for the transferor company as regards the whole of the rights and liabilities

of the latter without exception, and thus to secure, without delay and without the tedious formalities attendant upon a voluntary liquidation of transferor companies, that full and effective carrying out of the amalgamation which previously occupied so much time, and involved the execution of so many documents, and the making by the liquidators
A of so many arrangements with creditors, employees and others. Such, in my opinion, was the effect of the order made by the Chancery Division of the High Court on June 4, 1937. It follows that, in my judgment, the respondents were substituted as from that date for the Hickleton Main Colliery Co., Ltd., in the contract of service made
B between the appellant and that company, as was held both by the Divisional Court and the Court of Appeal, and that the judgment of the court of summary jurisdiction of Nov. 19, 1937, was rightly made.

My Lords, I am by no means unconscious of the fact that the construction which I have placed upon sect. 154 means that third parties
C who are in no way bound by the arrangement made by a company with its shareholders or creditors can be deprived by the court of their rights without their consent. A landlord who has stipulated with his lessee that the demised premises shall not be assigned without his consent may find that the lease has become vested in a different lessee without
D his consent having been asked or obtained. A person who has contracted to supply goods or materials to one company may find that without his consent he has become bound to supply the goods or materials to a different company. A servant may suddenly find himself obliged to render his services to a new master without his wishes having been
E consulted. It is said that in these and similar cases an injustice will be done by the section if it be construed as I have construed it. I must, of course, concede that, if there are two possible constructions of a statute, of which the one will cause what seems to be an injustice and the other will not, the latter is to be preferred. However, as was said
F by LORD HERSCHELL, L.C., in *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal* (11), at p. 516:

> . . . a sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well-settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment.

G With all respect to those who think differently, I cannot, consistently with well-settled rules of construction, so read the section as to avoid causing the alleged injustices to which I have referred. Take the case of the landlord. The lease is, without question, part of the property of the transferor company. How is it possible consistently with well-
H settled rules of construction to exclude that property from the operation of the section? Property, moreover, for the purposes of the section, includes rights of *every* description. Under its trading contracts and its service contracts, the transferor company, as I have already said, undoubtedly possesses rights. What rule of construction will permit such rights to be excluded?

It is contended that an answer to these questions favourable to the appellant is to be found in subsect. (1) (*a*), under which the court may by the order make provisions for the transfer to the transferee company of the property and liabilities of the transferor company. The use of the word "transfer," so runs the argument, shows that the only property which can be affected by the order is property which the transferor company can by itself transfer; but there seem to me to be several objections to this argument. In the first place, the transfer for which provision may be made is not a transfer by the transferor company at all. It is not, indeed, a transfer which is to be made by anybody. The making of the provision for a transfer is merely the machinery for bringing into operation the vesting of the property in the transferee company under subsect. (2). In the next place, the provision for transfer extends, not only to property, but also to liabilities, and the transferor company could not by itself transfer its liabilities to the transferee company so that, to use the words of subsect. (2), they become the liabilities of the transferee company. The word "transfer" cannot have one meaning when applied to liabilities and a more restricted meaning when applied to property. Finally, the section contemplates that the order which provides for the transfer may also provide for the contemporaneous dissolution of the transferor company, in which case any property of that company of which the transfer is not provided for by the order can never be transferred to, and vested in, the transferee company at all. The words of the section seem to me to be quite unambiguous, and I am not prepared to depart from what appears to me to be the plain meaning of the section by reason of the possible injustices which it may cause. Nor can I see any good reason for supposing that the injustices to which I have referred, if they can properly be so called, were not within the contemplation of the legislature. No one can doubt that, by an order under sect. 154, the court can vest the liability of the transferor company for a simple contract debt in the transferee company by the same order which causes the extinction of the former company. The result is that a man who has given credit to a company which he knows suddenly finds that he has to rely upon the credit of a company of which he knows nothing, and is without any remedy against his former debtor. The injustice inflicted upon him, such as it is, differs in no material respect which I can see from that inflicted upon the landlord, the contractor, and the servants of the company. If the injustice in the former case was within the contemplation of the legislature, as it must, in my opinion, be assumed to have been, I can see no reason for thinking that the injustice in the latter cases was not equally within its contemplation.

In truth, however, it is an exaggeration to use the word "injustice" in such a connection as the present. If all, or the large majority, of the shares in one company are acquired by another, the first company will almost certainly come under the control of new directors and managers, carrying out a policy which may differ widely from that of their predecessors, yet no one could possibly say without gross exaggeration that the landlord, the contractors, or the servants of the first company had suffered an injustice. Their position, nevertheless, would differ little for any practical purpose from that in which they would be had the first company become amalgamated with the second company by means of an exercise of the powers conferred on the court by sect. 154 of the Act, construing those powers as I think they should be construed. My Lords, for these reasons, I would dismiss this appeal.

Lord Porter [read by Lord Thankerton]: My Lords, the facts in this case have been fully stated by my noble and learned friend Lord Atkin, and it is unnecessary for me to repeat them. It is clear from that statement that the solution of the question at issue depends solely on the true construction of the Companies Act, 1929, ss. 153, 154, and primarily on sect. 154, which provides as follows:

> (1) . . . the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters :—(*a*) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company . . . (*c*) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ; (*d*) the dissolution without winding up, of any transferor company . . . (*f*) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out. (2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect. . . . (4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

It will be seen from the wording quoted that the matter to be determined is what is included under the word "property" in subsect. (1) (*a*) as defined in subsect. (4). The sections give a new power to the court to reconstruct or amalgamate companies, a power which was first given by the Companies Act, 1928. That Act, however, was passed by way of preparation for the inclusion of its provisions in the consolidating Act of 1929, and never came into force. The provisions now to be considered, therefore, may be regarded as coming into effect as a result of sect. 154 of the Act of 1929. Before that date, no such power of reconstruction or amalgamation existed. If an amalgamation had previously to be effected, it could have been accomplished by winding up one or both of the original companies. Alternatively, a somewhat similar result could have been obtained by transferring the shares of both to a holding company. The actual amalgamation of the two companies could not have been carried out directly by an order of the court, but only in one of the ways suggested. Sect. 154 now gives power to a judge of the Chancery Division to take a short cut and avoid the delay and expense of following the course previously imperative. The

question at issue is, does it do more than this ? Does it by an executive act transfer to the new body all the contractual rights of the companies, in spite of any safeguards against transfer, whether express or implied, contained in their contracts with third parties ? Does it transfer contracts by their terms non-transferable, and those, such as contracts of service, which at common law could not have been transferred without A
the consent of both parties ? Undoubtedly, to effect such a result would be to make a momentous change in the law as it previously stood, a change which from one point of view affects companies only, but which, from the other, affects many individuals who have entered into contracts with them. The same considerations might perhaps be raised by asking B
whether sect. 154 is procedural only, enabling what previously could have been accomplished by one method to be carried out by another, or whether it changes the rights of third parties *vis-à-vis* the company.

I do not find myself assisted at this stage by a consideration of the probability or improbability that the Act intended to produce the one C
result or the other. Primarily, I think that the question is one of construction. The argument on behalf of the respondents, which was accepted in the Court of Appeal, was that the transfer of " property " spoken of in subsect. (1) (*a*), which is said by subsect. (4) to include property, rights and powers of every description, must include every D
contract of the original companies, and that words so wide must be held to substitute the amalgamated company for the original constituent companies, so that the amalgamated company must be held to be, as it were, the same entity as each of the old companies, and to succeed to all their contracts without requiring the consent of other interested E
parties to the change. I will consider the meaning of the word " property " itself later on. For the moment, I desire to consider the words with which it is associated. In the first place, I do not think that its meaning is elucidated by the fact that it is found in collocation with the word " undertaking." The word " undertaking " is inserted, I F
think, in order to make it plain that the business will be transferred as a going concern. Nor, in my view, does the definition in subsect. (4) settle the question in favour of the respondents. " Property, rights and powers of every description " is not to me a familiar phrase. I should have thought that the additional words added after " property " G
were inserted merely in order to make sure that all the assets of which the original company could dispose were transferred on the amalgamation. Indeed, without them, I think, it might have been contended that the right which the original company possessed to call up uncalled capital was not transferred. At any rate, there might be some doubt in the H
matter : *Bank of South Australia* v. *Abrahams* (12) and *Re Patent Ivory Manufacturing Co., Howard* v. *Patent Ivory Manufacturing Co.* (13). An examination of the decisions in those two cases, in my view, at least, suggests the desirability of adding the word " rights " or the word " powers," or both, in defining the property to be transferred.

Nor do I find myself assisted by a consideration of the word "liabilities," or the definition which includes duties within it. A company to which the undertaking of another company is transferred at the instance of the latter and by its own consent must necessarily, if justice is to be done, undertake the liabilities towards third parties under any contracts entered into by the original company. If it did not, both the original and the amalgamated company would escape all liabilities to servants and contractors, the original company upon its dissolution as contemplated by sect. 154 (1) (*d*) of the Act, and the amalgamated company because no liabilities would have been transferred to it.

The shareholders and creditors of the companies to be amalgamated are the initiators of the steps taken, and need not enter into the compromise or agreement unless they wish. They alone are entitled to be represented, either when the arrangements for the amalgamation are being made, or before the court when application is made to it under sect. 154. Moreover, under sect. 155, provision is made as to dissenting shareholders. On the other hand, contractors, unless creditors, and employees have no say in the matter, and are not entitled to be represented at any time.

In these circumstances, I do not see why it should follow that the amalgamated companies, because they undertake the liabilities of the original companies, should in return obtain under sect. 154 (1) (*a*) the benefit of the contracts which by their nature are not transferable. Nor do I think that any such result follows, though sect. 154 (1) (*c*) provides that liabilities or alleged liabilities which have resulted in the taking of proceedings against the original company are to be treated in the same way as liabilities which have not so resulted, and provides that they are to be transferred to the amalgamated company. In the former case, the court which is asked to sanction the arrangement can assure itself that the assets of the amalgamated company are sufficient to answer liabilities already incurred. To discover whether that company can meet its future liabilities is a different and more difficult matter. In the latter case, it merely makes a similar provision where the liability has already given rise to the issue of a writ. Sect. 154 (1) (*c*) also enacts that legal proceedings by the original company may be transferred to the amalgamated company. Such claims seem to me to have nothing in common with contractual obligations where no cause of action has arisen. There is no question of transferring a contract against the will of the defendant. All that is provided for is that an accrued right should be enforceable, after substituting one plaintiff for another, in an action which, in the case of a winding up, a liquidator would have been entitled to continue under the Act of 1908, and, where no amalgamation had taken place, would have been entitled to continue to-day.

Having regard to these considerations, I find myself thrown back upon a consideration of the meaning to be placed on the word "property" in subsect. (1) (*a*). *Prima facie*, I should not expect it to include non-transferable contracts. In truth, the word "property" is not a term of art, but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found, and from the mischief with which that Act or document is intended to deal. The word is used in many Acts of Parliament, but I propose to confine myself to the Companies Acts themselves. The Companies (Consolidation) Act, 1908, s. 122, and the following sections, and the Companies Act, 1929, s. 156, and the following sections, deal with winding up. Sect. 151 (2) of the 1908 Act provides as follows: A

> The liquidator in a winding up by the court shall have power, but (subject to the provisions of this section) in the case of a winding up in Scotland or Ireland only with the sanction of the court, (*a*) to sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels . . . (*g*) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets. B

Sect. 189 of the 1929 Act contains similar provisions. In neither case has it ever been suggested, so far as I know, that the word C "property" included anything other than property of which the company then in course of being wound up could dispose. Certainly the word "property" in those sections does not include personal contracts. Indeed, winding up by the court constitutes a dismissal of the company's employees for which they are entitled to compensation as for wrongful D dismissal.

No doubt it would simplify the administration of the sections now under consideration if the amalgamated company were held to be substituted for the original company and to succeed to all its liabilities and contracts, whether transferable or not, but ease of administration E is not everything, and, if so great an alteration in the law as it previously existed is to be made, a clear expression of its intention must be given by the legislature. I find no such clarity in sect. 154. Indeed, one can point to a number of difficulties which would arise if the construction put forward by the respondents were to be adopted. One example may F suffice. A company may have contracted to take all its requirements from a third party, or may have appointed a general manager or managing director for all its undertakings. How could the quantum of those requirements be ascertained, or the area of the undertaking which had to be supervised be known, after the amalgamation was effected? No G doubt the amalgamated company would be liable in damages if they failed to take the necessary material, or employ the manager, but that is merely to adopt the construction suggested by the appellant, and not to solve the difficulty posed by the respondents' construction of the Acts.

Apart from these considerations, I do not myself feel that in this H particular case any great hardship would be imposed upon the appellant if the respondents' construction were accepted. Workmen are entitled to, and must receive, the same consideration as any other employees of the company, but their contracts are for a short term, and no serious disadvantage is likely to be caused by their being transferred without their consent to a new company for a period of a week or a fortnight. I can imagine the legislature entrusting to a judge of the Chancery Division the task of seeing that their interests were properly protected. However, the argument cuts both ways. Just as no great hardship would be caused, so no great difficulty would arise, if the original company were compelled to give a week's or a fortnight's notice to its employees with an intimation that the amalgamated company would be prepared to accept their services as soon as it was formed. On the other hand, the appellant's interpretation of the section would safeguard alike the interests of the workman and of those with long-term contracts and of any other persons who, either by express words or implied terms, were under no obligation to accept a substituted party to their contracts in the place of the party with whom they had originally come to terms. I am prepared to accept the view that to place in the hands of the court the right to make a change of the kind suggested would be of some advantage in preventing those who had contracted with the original company from endeavouring to obtain some undue advantage as a condition of their consenting to supply or serve the amalgamated company. There are, it is true, advantages and disadvantages in either construction, but the change contended for is a grave one, and, in my opinion, the wording of the section is far from being sufficiently precise to have the suggested effect.

I may sum up my view by saying that the word " property " in sect. 154, whether considered alone or in conjunction with the words " rights and powers of every description," means property with which the original company has the right to deal without having to obtain the consent of some third party, and I cannot think that the addition of sect. 154 (1) (*f*), empowering the court to make provision for incidental, consequential and supplementary matters, is sufficient to widen the content of the section so as to include non-transferable contracts. I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Hosking & Berkeley*, agents for *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the appellant); *Bird & Bird*, agents for *Gichard & Co.*, Rotherham (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

BARNETT *v.* H. & J. PACKER & CO., LTD.

[KING'S BENCH DIVISION (Singleton, J.), **June 24, 1940.**]

Negligence—Dangerous goods—Sale for purposes of resale—Liability of manufacturer to retailer—Opportunity for intermediate examination after sale for purposes of resale.

The defendants were manufacturers of sweets. A 7-lb. box of sweets manufactured by them was sold to a middleman, who supplied them to the plaintiff. The plaintiff was putting the sweets into a display tray when his finger was injured by a piece of wire in one of the sweets. He sued the defendants in negligence, basing his case upon the decision in *M'Alister* (*or Donoghue*) v. *Stevenson* (1). It was contended for the defendants that this case was not within that decision, and that, if it were, there was ample opportunity for intermediate examination :—

Held : the defendants were negligent, and the case was within the doctrine of *M'Alister* (*or Donoghue*) v. *Stevenson* (1).

[**EDITORIAL NOTE.** In many of the cases which have invoked the doctrine laid down in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), the goods have been packed in a container and intended to reach the ultimate consumer still inclosed in that container. In this case, the sweets would not ordinarily have been sold to the ultimate consumer otherwise than in small parcels. Normally, therefore, there would seem to be an opportunity for intermediate examination, but, in the circumstances of the present case, the accident seems to have happened before that opportunity occurred.

As to Application of Doctrine in *M'Alister* (*or Donoghue*) v. *Stevenson*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887 ; and for Cases, see DIGEST, Supp., Negligence, Nos. 364a-364f.]

Cases referred to :-

(1) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

(2) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85 ; Digest Supp. ; 105 L.J.P.C. 6 ; 154 L.T. 18.

(3) *Daniels and Daniels* v. *White & Sons, Ltd., and Tarbard*, [1938] 4 All E.R. 258 ; Digest Supp. ; 160 L.T. 128.

Action for damages for negligence. The facts are fully set out in the judgment.

C. W. Measor for the plaintiff.

N. L. C. Macaskie, K.C., and *Montague Berryman* for the defendants.

Singleton, J. : This is not an easy case. In April, 1938, the plaintiff had a confectioner's business and bought some of the goods for sale at his shop from one Marino, who bought from the defendants, who are manufacturers of sweets. The plaintiff's case is that about Apr. 12 he bought a 7-lb. box of milky drops from Marino, and it is admitted that that box of sweets was manufactured by the defendants and supplied by them to Marino. It was known that they were for sale by confectioners or in sweet shops, and that, in the ordinary course, they were for consumption. The plaintiff said :

> I had this box of sweets in my possession for a few days. Then I desired to put them out on a sort of tray in the shop window. It was a sloping tray, and I could not well pour them from the box into the tray or else they would have run down into the tray below, so I had to take them out by hand, or in some way, and I put in both my hands to take out a double handful of sweets to put them in the sloping tray or display dish. When I was doing that [he had removed some of them beforehand], I felt a sharp pain, and I pulled my hand out quickly, and there came on the third finger of my left hand a little spot of blood. I could see that I had pricked it in some way. I went and put some iodine on, as I keep a first-aid box at the shop, and I then determined to look to find what had caused this prick. I looked in the box. There was nothing in the box. I looked at the sweets, and in one of the sweets there was a piece of wire or steel, and, when I looked, that was the only thing which could have pricked me. I kept that sweet because I pricked myself on it.

He did not realise then that there was much damage done. He felt nothing more on the day, really. The next day his finger hurt him, and within a short space of time he had to attend a clinic at the hospital, when his finger was lanced. Obviously, blood-poisoning of some kind set in, which affected his hand and his arm to some extent, and the result is that he has not yet got back the full power of his grip. I have come to the conclusion that the piece of metal was in the sweet, and that it was that piece of metal which caused this injury.

Counsel for the defendants submitted that this case was not governed by *M'Alister (or Donoghue)* v. *Stevenson* (1) because here there was an opportunity in the plaintiff or in Marino to examine the goods which had been bought. To put it in another way, there was no sort of control over the article which was sold in a case of this kind such as there was in the case of the ginger-beer bottle in *M'Alister (or Donoghue)* v. *Stevenson* (1). Various passages in the opinions in *M'Alister (or Donoghue)* v. *Stevenson* (1) have been read to me by counsel for the defendants and by counsel for the plaintiff. It seems to me that, if a shopkeeper buys a large box of sweets, in the ordinary course, he has not the opportunity of examining each one of those sweets until he puts them out or takes them out. He is not called upon to examine each one immediately he buys. The plaintiff's first opportunity of examining the sweets was when he took them out of the box, and he was doing that when this accident happened. The sweets were in a 7-lb. box. In my view, the sense of control is just as much in the manufacturers in that kind of case as it is in the case of the ginger-beer bottle, and I think that the same doctrine applies.

A great many people thought that the doctrine of *M'Alister (or Donoghue)* v. *Stevenson* (1) went a long way. A great many people regarded it as a considerable alteration in the law, and no doubt it was. In my view, each such case ought to be carefully examined, and, in a case of this kind, it is my duty to see, in so far as I can, that the doctrine is not stretched at all, nor extended one inch beyond the length to which that case has gone.

In *Grant* v. *Australian Knitting Mills, Ltd.* (2), LORD WRIGHT said, at pp. 102, 103:

> Their Lordships think that the principle of the decision is summed up in the words of LORD ATKIN [p. 599]: "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

A little later on LORD WRIGHT said, at p. 103:

> It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of care, again no case of actionable negligence will arise unless the duty to be careful exists. In *Donoghue's* case (1) the duty was deduced simply from the facts relied on—namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger: there was, it is true, no personal intercourse between the maker and the user;

> but though the duty is personal, because it is inter partes, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; no question of consideration between the parties is relevant: for these reasons the use of the word "privity" in this connection is apt to mislead, because of the suggestion of some overt relationship like that in contract, and the word "proximity" is open to the same objection...

Bearing in mind what was said in *M'Alister (or Donoghue)* v. *Stevenson* (1), I think that it is clear that the duty is present in this case. A
I think that it is clear, too, that there was negligence on the part of the manufacturers in this sense. When Sargent, who explained to me the manner of manufacture of the sweets and the different processes through which the materials went, was cross-examined by counsel for the plaintiff, B
he said:

> Two people had an opportunity of inspecting the sweets before they are passed They should have found the metal if it were there.

Why did those two people examine them? They did so in order to examine, as he said, the shape to some extent, and in order to see that the sweets were all right before they were passed. Each of those two C
people, I gather, had a duty—namely, to examine—and each of them, according to Sargent, would have seen the metal if it were there. I am satisfied that the metal was in the sweet when it was passed. Each of those persons, then, ought to have seen it, and could have seen it. They were examining the sweets for that purpose, and they did D
not see it. In my view, that is failure to exercise the proper care which they ought to have exercised, and, though it may be said that it is a small thing, and though it is said that these defendants with regard to these particular sweets have had no complaint before, I am bound to find that, in the circumstances, there was negligence. E

Counsel for the defendants also referred me to the decision of Lewis, J., in *Daniels and Daniels* v. *White & Sons, Ltd., and Tarbard* (3), where Lewis, J., held as follows, according to the headnote:

> . . . the duty owed by the manufacturers to the consumer was not to ensure that their goods were perfect, but merely to take reasonable care to see that no injury F
> was done to the consumer or ultimate purchaser, and this duty they had completely fulfilled.

On the evidence in that case, Lewis, J., came to the conclusion that the plaintiff had not established the case on that allegation, though on another part of the case, a small part, the plaintiffs did succeed.

In this case, I am faced with the fact that the defendants tell me: G
"We put on two people to examine. Those people would have seen this wire or nail if it had been present." If the matter is left in that state, and if I am satisfied, as I am, that the metal was in that sweet, how can I find that that was not negligence? It seems to me that I am bound to find that the defendants were negligent. H

I think that the right sum to award as damages is the sum of £550.

Judgment for the plaintiff for £550.

Solicitors: *H. Howard & Co.* (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

COOPER *v.* COOPER (KING'S PROCTOR SHOWING CAUSE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **July 25, 1940.**]

Divorce—Desertion—Continuance of desertion—Non-cohabitation clause—Clause inserted through inadvertence.

In a wife's undefended petition for divorce on the ground of desertion, she produced a justices' order, dated May 27, 1931, adjudging that her husband had unlawfully deserted her. The printed form of order contained a clause "and it is ordered that the applicant be no longer bound to cohabit with her husband, his wife, the defendant." This clause was left standing in its full form. The order was served on the husband, but it was proved that he stated that he had no intention of returning to his wife, who was at all material times willing to receive him back. It was also shown to the satisfaction of the court that the clause had been left in the order by inadvertence :—

HELD : in the circumstances of this case, the inclusion in the order of the non-cohabitation clause did not prevent the continuance of the desertion.

[**EDITORIAL NOTE.** It is settled by the decision of *Harriman* v. *Harriman* (1) in the Court of Appeal that the insertion of a non-cohabitation clause is a bar to subsequent desertion. This aspect of this case, which was first before the court in Nov., 1939, was considered in the Court of Appeal during the hearing of *Mackenzie* v. *Mackenzie* (2), when some doubt was thrown upon its correctness. Upon the further hearing here reported, the facts have been more fully explained, and the decision in *Harriman* v. *Harriman* (1) has been distinguished.

AS TO NON-COHABITATION CLAUSE IN MAGISTRATES' ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 659, para. 969 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

(1) *Harriman* v. *Harriman*, [1909] P. 123 ; 27 Digest 321, *2995* ; 78 L.J.P. 62 ; 100 L.T. 557.

(2) *Mackenzie* v. *Mackenzie*, [1940] 1 All E.R. 256 ; Digest Supp. ; 56 T.L.R. 300.

(3) *Cooper* v. *Cooper* (1939), 56 T.L.R. 118 ; Digest Supp.

(4) *R.* v. *Lanyon* (1872), 27 L.T. 355 ; 3 Digest 403, *364*.

INTERVENTION by the King's Proctor to set aside a decree *nisi* for divorce obtained on the ground of desertion. The facts are fully set out in the judgment.

E. Holroyd Pearce for the King's Proctor.

SIR BOYD MERRIMAN, P. : This is a King's Proctor's intervention in a wife's undefended divorce case which came before me on Nov. 20, 1939. On that occasion, I pronounced a decree *nisi* on the ground of desertion. As far as the origin of the desertion was concerned, the case appeared to be perfectly normal. The wife produced a finding of the justices, dated May 27, 1931, that her husband had unlawfully deserted her. She substantiated that by evidence before me, and proved that there had been no resumption of cohabitation, but of course she had to prove also that the desertion subsisted during the 3 years immediately preceding the presentation of the petition. On the justices' order there appeared unerased these words:

> It is adjudged that the complaint is true and it is ordered that the applicant be no longer bound to cohabit with her husband, his wife, the defendant . . .

Then there was a further order about custody and a further order about maintenance.

It is, of course, an elementary proposition that, where the spouses are living apart under a separation order, it is impossible to assert that desertion runs while that separation order is in force. Even if I had been unaware of that proposition, and of the authority upon which it was based, I should have been informed about it by counsel for the petitioner in the opening sentence of his observations, he having called my attention to the clause which I have just read, and having said: "Of course, I am bound by *Harriman* v. *Harriman* (1) if it was properly put in, but my contention is that it was put in entirely by mistake. The court simply left it in the printed form."

It is quite clear from the shorthand note that the points about which I was in doubt, and about which I required evidence, were two, (i) whether it was sufficiently proved that the justices had not made a separation order, and that this senseless phrase appeared in the formal order, as was asserted, merely by clerical error; and (ii) whether, even assuming that that were established, as the order in its present form was shown to have been served upon the husband, it might not be said that his subsequent absence was justified by the form of the order.

I am going to take the last point first, because, as counsel for the King's Proctor has argued, there is no doubt whatever on the face of the shorthand note about that particular point. This was an undefended case, and, with his customary frankness, counsel for the petitioner put all his difficulties before me at the outset. The case was conducted by him, not in any inimical way, and my finding was given on the merits. The wife had herself given evidence that she had always been anxious to have her husband back. He had gone to live with another woman, and the wife had done her best, not only to persuade her husband to come back to her, but also to persuade the other woman to give up the husband, and this had gone on up to the very moment when the wife had felt bound to take proceedings in the police court. She never wanted anything but maintenance. The last thing she wanted was an order separating her from her husband. That was the wife's evidence.

Then the husband's mother proved that, after the police-court proceedings, though not directly with the wife's sanction, but because she herself knew that this was what the wife wanted, she went round to the husband and told him that it was his duty to come back to his wife, while the husband had said that he was quite content as he was, and had no intention of making any change. My conclusion upon that was that the service of the order did not have any effect upon him.

The question of whether an order had been made was then considered. Counsel for the petitioner put in the forefront of his argument the senseless form of this particular clause, but he was not content with that alone. He called the assistant clerk to the justices. That assistant clerk had not held that office at the time when that particular order was made. The then assistant clerk was not available, for a reason which I need not specify, but which was conclusive. Consequently, the court was in the difficulty that evidence about the question whether or not an order had been made was not the best evidence. However, the assistant clerk produced the current minute-book in use at that particular court. At that time, the system of holding separate matrimonial hearings had not been evolved, and consequently there were only a few matrimonial causes in the book. First of all, he produced the minutes of the particular order recording the evidence and the actual adjudication. The note of adjudication was as follows:

> Adjudication: Desertion proved. Order made for husband to pay wife £1 15*s.* and 5*s.* for child. Costs £2 2*s.* Custody of child to wife. Payments to be made through collecting officer.

In the report of this decision in the WEEKLY NOTES, that aspect of the matter is fully brought out, and that adjudication quoted in full, but in the report in the TIMES LAW REPORTS, to which I have been referred in the course of the argument, there is no detailed reference to that part of the case. Even so, although, on the face of it, it appeared as clear as could be (taking this note of adjudication by itself) that no separation order had been made, having regard to the fact that courts notoriously were not as strict in 1931 as they are to-day in the drawing up of orders, I adjourned the case in order that there might be an investigation of all the matrimonial cases in that book for the purposes of comparison. The result of that was to confirm the impression which the note of adjudication made, with the exception that there was one case in which desertion had been proved, although the non-cohabitation clause had been left in. On the contrary, there was another case in which the fact that only a maintenance order was being made was recorded. Thus, the matter was not absolutely conclusive. There remained, however, the fact that in this particular case the wording of the supposed order was, as I have already said, senseless on the face of it. In those circumstances, as I had already disposed of the question whether the supposed order had had any effect on the husband, a final discussion took place between counsel for the petitioner and myself. He reiterated that his case was that the non-cohabitation clause was not intended to be in the order at all, and I said: "Nobody was thinking about separation." I added:

> My only doubt is whether I ought to have the clerk here. It is very imperfectly proved, but I think that really the whole point is that nobody was thinking about it at all.

When I used the words "very imperfectly proved," both the immediate context and a passage which occurs on the following page make it clear that I was referring to the fact that, unaware at the time that the clerk was not available, I had had only the evidence of a man who was speaking at second-hand, instead of that of the man who would have been able to speak at first-hand. In other words, I had had circumstantial, instead of direct, evidence as to whether or not an order had been made. Then I went on to say: A

> She did not want protection. She was not asking for protection, and nobody has treated it, from first to last, as being effective in any way, neither the husband nor the wife. Unfortunately, it is found in its present form to be in the order—that is to say, not to have been erased—and, as you point out, it does not make sense. I think that, on the whole, it would be pedantic to treat this as an effective non-cohabitation clause.

B

Accordingly, I pronounced a decree *nisi*, and there the matter would have ended but for the fact that a very short report on this case [56 T.L.R., at p. 118] was cited to the Court of Appeal in *Mackenzie* v. *Mackenzie* (2), in which an attempt had been made to get behind a separation order, apparently perfect on the face of it. In that case, Slesser, L.J., said at pp. 301, 302 ([1940] 1 All E.R., at pp. 258, 259): C

> Mr. Scott Henderson agrees, as I understand him, that *Harriman* v. *Harriman* (1) would have been fatal to his appeal but for the decision of Sir Boyd Merriman, P., in *Cooper* v. *Cooper* (3). In that case the wife had obtained from a court of summary jurisdiction an order for maintenance on the ground that her husband had deserted her, but by inadvertence—as here, I think—the non-cohabitation clause was not struck out. In that case the clause was not in a form which made it very sensible, D because, according to the report in the Times Law Reports, it stated that "the applicant be no longer bound to cohabit with her husband his wife." Sir Boyd Merriman, P., treated the case, as I read his judgment, on the basis that the order was—as the order is here—that the petitioner was no longer bound to cohabit with her husband. In that sense *Cooper* v. *Cooper* (3) was a case precisely like the present one. There, as here, those words were left in. Sir Boyd Merriman, P., said that the petitioner's case was that the non-cohabitation clause was never E intended to be in the order. So here. Sir Boyd Merriman, P., said: "The petitioner did not want protection, and was not asking for protection. From first to last, neither the husband nor the wife was treating the clause as effective in any way. Unfortunately, it was found to be in the order in its present form—that was to say, not to have been erased, and, as counsel had pointed out, the clause did not make sense." Eliminating that question of its not making sense, Sir Boyd Merriman, P., went on to say that he thought "that it would be pedantic to treat it as an effective non-cohabitation clause." I think that is on the basis that it F might make sense. If Sir Boyd Merriman, P., treated it as being a non-cohabitation clause which did make sense, and was to be read that the petitioner be no longer bound to cohabit with her husband, I think that he was wrong in the conclusion to which he came. I think that that conclusion would be inconsistent with the decision of this court in *Harriman* v. *Harriman* (1) to which I have just referred.

On the same assumption, Goddard, L.J., said at p. 302 [1940] G 1 All E.R., at pp. 259, 260:

> One difficulty which I have with regard to *Cooper* v. *Cooper* (3) is that there is nothing in the report to show on what Sir Boyd Merriman, P., was founding when he said: "From first to last neither the husband nor the wife was treating the clause as effective in any way." It may be that there was some evidence before him to that effect, but there is nothing in the report to suggest that there was. Even if there had been, I do not know how, so long as the order stood, it could H be disregarded by the court in view of the decision in *Harriman* v. *Harriman* (1).

I do not understand, and counsel for the King's Proctor has not been able to explain to me, how the assumption came to be made that the question of the clause making sense was to be eliminated. I assume that it was because of the very abbreviated report in the Times Law

Reports, but, even so, it appears on the face of it that that was one of the points upon which I relied. At any rate, I agree, with the greatest possible respect, that, if I had decided *Cooper* v. *Cooper* (3) on the ground that the parties for one undecided reason could treat as non-effective a separation order which had actually been made, it is a decision which could only have been reached in ignorance, or in defiance, of the decision in *Harriman* v. *Harriman* (1). I hope that I have made it clear that that was not the decision at which I arrived, and that I was concerned, not with the question whether the spouses had treated as ineffective a separation order which had actually been made, but with the question whether they, and in particular the husband, had recognised as being an effective separation order an order which had not in fact been made at all. However, as the decree absolute has not yet been made in this case, it seemed to me that a very awkward situation had arisen because of those observations upon *Cooper* v. *Cooper* (3) which were made in *Mackenzie* v. *Mackenzie* (2), and I felt that it would be wrong, and, indeed, would be gravely lacking in respect to the Court of Appeal, to allow the matter, as it were, to go by default, two members of the Court of Appeal having said that the decision was one which could not be justified.

Accordingly, acting under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181 (1), I referred the matter to the King's Proctor. I chose that course rather than the only other possible course of having the matter brought up specially on decree absolute in order to explain why, notwithstanding these observations, a decree absolute was being pronounced, because I was conscious that there was a grave element of doubt on the question whether or not the order had been made, and I thought that the proper course was to evoke the assistance of the King's Proctor both on the point of fact and on any question of law which might arise from it. It was obvious that the result of such investigation might be, on the one hand, that it would be shown conclusively that a separation order had indeed been made, in which case, of course, the King's Proctor would have considered whether on the new facts an intervention would be justified in order that the decree might be rescinded on the ground that new material had been put before the court, or it might show, on the contrary, that the order had not in fact been made. I acknowledge with gratitude that the most thorough investigation has been made on this rather difficult point, but, if one has regard to what has subsequently happened, it is not necessary for me to go into it in detail. Suffice it to say that the former clerk, who was actually concerned with the proceedings, has been seen, and he has assured the King's Proctor that he was satisfied that the present form of the clause was nothing but a clerical error. The present clerk has also expressed his own view that a separation order was not in fact made, and that the clause in its present form is in the order by reason of a clerical error. That is the considered view of the matter which counsel for the King's Proctor has put before me. I ought to say that it has been reinforced by a minute examination of current orders. I need not go into the details of it, and there is still some little doubt in so far as the matter depends upon merely circumstantial evidence, and not upon the former clerk's statement, but, taking one thing with another, counsel for the King's Proctor has told me that he is instructed A to say that the King's Proctor is satisfied that a separation order was not made, and that the clause as it now appears is in the order merely by reason of a clerical error.

I need only say, therefore, that, if the matter had rested there, with this further information, I should not have felt bound by the judgments B to which I have referred in *Mackenzie* v. *Mackenzie* (2), in the Court of Appeal, to rescind this decree, because they seem to me to be based upon a misapprehension as to what had been decided in this case, and counsel for the King's Proctor intimated quite plainly that the King's Proctor would not have invited me to take any other view. Counsel C for the King's Proctor has shown me, I think, conclusively, having regard to the decision in *R.* v. *Lanyon* (4), that the safe course in such cases, where there is any doubt about the matter, is to get the order rectified, as he suggests (and I think rightly), at any time before bringing the case into court, or perhaps it would be safer to say at any D time before the petition was filed. However, as in this case the order, or supposed order, is senseless on the face of it, counsel for the King's Proctor does not put forward the view that such a rectification is necessary. He is suggesting that the onus of saying that there was an effective separation order, in such circumstances, lay upon anybody E who asserted that fact. I am not quite sure about that. I incline to the view that the way in which it was approached at the former hearing was that it was for the petitioner to prove the whole of her case, including the absence of any separation order, and that the onus rested upon her. Whichever way the onus lies, however, counsel for the F King's Proctor does not seek to argue that, where a clause is senseless and one is satisfied that it is included merely by reason of a clerical error, it affords any bar to an assertion of desertion.

I cannot help thinking that the matter can be quite simply tested in this way. Assuming that the order in its present senseless form had been G drawn up after justices had said in open court that they were not making a separation order, and assuming that it had been shown by plain and unequivocal evidence that, upon that basis, discussions about the resumption of cohabitation had taken place between the parties afterwards, it seems to me that, in such circumstances, it would be not merely H pedantic, but utterly absurd, to treat a clause of this character as a bar to desertion which is proved to have existed at that time and to have continued until the presentation of the petition. At any rate, if that is to be held, it must be held by some other tribunal. There is nothing in the decision of the Court of Appeal in *Mackenzie* v.

Mackenzie (2) or in their comments on this case which would have bound me to hold that, if that had been the remaining issue in this suit.

However, in the course of the King's Proctor's investigations, it was discovered that the petitioner herself had been living in adultery. In those circumstances there is no alternative but to accede to the King's Proctor's plea and to rescind this decree.

Decree rescinded and petition dismissed.

Solicitor: *The King's Proctor.*

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

MIRZA AKBAR *v.* KING-EMPEROR.

[PRIVY COUNCIL (Viscount Maugham, Lord Wright and Sir George Rankin), **May 27, 28, 1940.**]

Privy Council—India—Criminal law—Conspiracy to murder—Appeal to Court of Judicial Commissioner North-West Frontier Province—Appeal heard by judge sitting alone—Evidence of conspiracy—Statement by fellow-conspirator after conspiracy ended—Indian Penal Code, s. 302/120 B *—North-West Frontier Province Courts Regulation,* 1931, *s.* 7*—Indian Evidence Act, s.* 10.

The appellant was convicted under the Indian Penal Code, s. 302/120 B, of conspiracy to murder, in consequence of which conspiracy murder was committed. On appeal to the court of the judicial commissioner, the conviction and consequent death sentence was confirmed by a single judge, the additional judge being absent on leave for a further 20 days and the acting additional judge being unable to sit, as he had exercised previous judicial functions in the proceedings. On appeal to the Privy Council, it was contended that the sentence should be quashed on the ground that the case should have been disposed of by a Bench in accordance with r. 1 of the rules made by the governor of the North-West Frontier Province, which are the rules governing the procedure of the court, instead of by a single judge under r. 3, which bars from sitting any judge who has exercised judicial proceedings and provides that, where it is not practicable to constitute a Bench without such a judge, the appeal shall be heard by another judge sitting alone. Further, it was objected that a statement of a fellow-conspirator had been wrongly admitted in evidence, the statement having been made in the appellant's absence and after the offence had been committed:—

HELD: (i) the appeal was properly heard by a judge sitting alone, as it was not practicable in the circumstances to constitute a Bench.

(ii) the statement of the fellow-conspirator was wrongly admitted as evidence, but, in the circumstances, there had been no miscarriage of justice.

[**EDITORIAL NOTE.** It is possible that difficulty may be experienced, even in England, in constituting certain courts which require more than one member of the Bench. In India and the colonies, the difficulty is no doubt much greater, and the meaning of the words "if it is not practicable to constitute a Bench" becomes a matter of considerable importance. The Judicial Committee seem to think that there is an important difference between the expressions "reasonably practicable" and "practicable," and that, if at the time a delay of 20 days is necessary to secure a full court, it is not then practicable to constitute that court.

AS TO CONSTITUTION OF COURTS IN INDIA, see DIGEST, Vol. 17, pp. 454-456, Nos. 220-234.]

Cases referred to:

(1) *Emperor* v. *Benat Pramanik* (1935), I.L.R. 62 Cal. 900.
(2) *R.* v. *Blake* (1844), 6 Q.B. 126; 14 Digest 124, *942*; 13 L.J.M.C. 131.
(3) *Emperor* v. *Ganesh Raghunath* (1931), I.L.R. 55 Bomb. 839.
(4) *Emperor* v. *Abani* (1910), I.L.R. 38 Cal. 169.
(5) *Pakala Narayana Swami* v. *King-Emperor* (1939), 66 Ind. App. 66.

A

APPEAL from the judgment of the court of the judicial commissioner, North-West Frontier Province, dated July 10, 1939, which confirmed the conviction and sentence of death passed on the appellant by the sessions judge, Peshawar Division, on May 8, 1939. The facts are fully set out in the reasons for the report of their Lordships delivered B by LORD WRIGHT.

H. D. Cornish and *G. Greenwood* for the appellant.

G. D. Roberts, K.C., and *W. Wallach* for the respondent.

LORD WRIGHT: This is an appeal *in forma pauperis* by special leave from a judgment and order of the court of the judicial commissioner, C North-West Frontier Province, dated July 10, 1939. The judicial commissioner dismissed the appellant's appeal from his conviction of an offence punishable under the Indian Penal Code, s. 302/120 B—i.e., conspiracy to murder in consequence of which conspiracy murder was committed—and confirmed the sentence of death passed on him D by the additional sessions judge, Peshawar Division, on May 8, 1939.

The appeal raises two main points, which are the only points, in their Lordships' judgment, calling for consideration here. They are independent of each other. The first is a question as to the jurisdiction of the court by which the sentence was confirmed. It was contended E on behalf of the appellant that the court was not legally constituted, because the appeal to the court was dismissed and the sentence confirmed by a single judge of the court of the judicial commissioner sitting alone. The second was whether, if the objection as to jurisdiction failed, the decision of the court was vitiated by misreception of evidence. F As their Lordships announced at the conclusion of the arguments before them, they were of opinion that both points failed the appellant, and that the appeal should be dismissed. They will now state their reasons for coming to that conclusion.

The appellant was charged with conspiracy to murder in consequence G of which conspiracy murder was committed under the joint effect of the Indian Penal Code, s. 302/120 B. He was convicted and sentenced to death by the trial judge, Mr. Mohammad Ibrahim, additional sessions judge, Peshawar Division, assisted by 4 assessors, who were unanimously of opinion that all 3 accused, including the appellant, were guilty. The H facts of the case, and the circumstances in which they were convicted, will be dealt with, so far as relevant in this appeal, in connection with the second question, that of evidence. When, after some preliminary proceedings, the appeal came on for hearing before the court of the judicial commissioner on July 10, 1939, it was heard by ALMOND, J.C., the judicial commissioner, sitting alone. KAZI MIR AHMAD, A.J.C., the additional judicial commissioner, was absent on leave. The period of his leave was for 2 months, with effect from May 30, 1939. The Hon. Mr. M. A. SOOFI had been appointed under the Government of India Act, 1931, sect. 222 (2), to act as a judge of the court during the absence A of KAZI MIR AHMAD, A.J.C., but it happened that in this particular case the Hon. Mr. M. A. SOOFI was disqualified from sitting on the appeal, because, as the judicial commissioner at the outset of his judgment on the appeal explained, the Hon. Mr. M. A. SOOFI had exercised judicial functions in the proceedings. The question whether, in those B circumstances, the court was properly constituted by ALMOND, J.C., sitting alone, falls to be determined on the basis of rr. 1, 3, of the rules made on May 19, 1939, by the governor of the North-West Frontier Province in the exercise of the powers conferred on him by the North-West Frontier Province Courts Regulation, 1931, s. 7, as amended, C for the purpose of specifying the classes of civil and criminal proceedings which were to be heard by a Bench of the court of the judicial commissioner, North-West Frontier Province. The rules provide respectively as follows :

> D Rule 1 of the said rules provides that the following classes of criminal cases are to be disposed of by a Bench, viz., any appeal from a sentence of death or of transportation for life and any cases of confirmation or revision of any such sentence.
>
> Rule 3 provides that notwithstanding anything contained in these rules where a judge of the court has in a subordinate capacity exercised judicial functions at any stage of a criminal proceeding or is personally interested therein, he shall not hear any appeal or reference arising out of such proceeding, and if it is not E practicable to constitute a Bench without such judge, such appeal or reference shall be heard by another judge sitting alone.

That the Hon. Mr. M. A. SOOFI was disqualified under r. 3 was not disputed, but it was contended on behalf of the appellant that, in the circumstances of the case, compliance with r. 1 was not excused, and F that the appeal could only be legally disposed of by a Bench. It was not established, so it was contended, that it was not practicable to constitute a Bench without such judge—that is, the Hon. Mr. M. A. SOOFI—and, accordingly, the appeal could not legally be heard by another judge—in this case, the judicial commissioner—sitting alone.

G Their Lordships are of opinion that the objection is not well-founded. On July 10, 1939, when the appeal came on for hearing, it was not practicable to constitute a Bench without the Hon. Mr. M. A. SOOFI, because there was no other judge of the court available to sit with ALMOND, J.C. In the event, the precise language of r. 3 was thus H satisfied. It was contended, however, that the appeal might have been adjourned until the return of KAZI MIR AHMAD, A.J.C., from his leave—say, until July 30, 1939, an adjournment of 20 days. However, their Lordships find in the rule nothing to justify this qualification of the words of the rule. If, however, there is some reservation implied, so that the rule is to be construed as meaning " not reasonably practicable," there must be some authority to decide what is reasonable in the circumstances. Their Lordships think that this authority can be no other than the judge. To decide whether or not an appeal shall be adjourned is particularly a matter for the discretion of the judge. It is not here necessary to decide whether in any case the decision of the judge under r. 3 can be overruled, but their Lordships think that, if the exercise of this discretion, which is a judicial discretion, is to be in any case overruled, strong grounds for doing so must be shown. It is enough to say that no such grounds are shown here.

No authority directly in point has been cited. Reference was made to various decisions under the Code of Criminal Procedure, s. 274, which provides that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than 7 persons, and, if practicable, of 9 persons. The language of this provision is different from that of the rule, and the conditions are different, particularly in view of sect. 276, which enables a deficiency to be made good by leave of the court by choosing other jurors from persons who may be present. There has been some difference of judicial opinion as to the true effect of sect. 274, but the more recent, and, in their Lordships' opinion, better, view is that adopted in *Emperor* v. *Benat Pramanik* (1), which is that, if the judge proceeds with 7 jurors, it must be assumed, in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than 7 jurors, that sect. 274 had been complied with. These decisions, so far as they go, may tend to support the opinion just expressed in regard to r. 3, but, as already stated, they do not give direct help in the construction of r. 3. In their Lordships' judgment, the objection of want of jurisdiction fails.

The second objection requires some statement of the facts and the evidence. The appellant was tried along with the actual murderer, Umar Sher, and with Mst. Mehr Taja, who had been the wife of the murdered man, Ali Askar. The murder was committed on Aug. 23, 1938, in the village of Taus Banda, about 4 miles from Hoti. The guilt of Umar Sher was not really open to doubt. He was practically caught red-handed. He was caught running away with a single-barrel shot gun in his hand, the barrel of which smelt as if freshly discharged. There was an empty cartridge jammed in the barrel. When the appellant came up from the field in which he had been working about half-a-mile away from the scene of the murder, he asserted that Umar Sher was innocent and should be released, but the others present refused to do so. Umar Sher's main defence seems to have been absence of motive. This fact, however, was relied upon by the prosecution as showing that he was a hired assassin bribed to commit the murder by the appellant and Mst. Mehr Taja, who were co-conspirators in that regard. This was found by the court to have been the fact. The principal evidence of the conspiracy between these two prisoners consisted of three letters, two from the female prisoner to the appellant and one from the appellant to the female prisoner. The authenticity of the letters as being what they purport to be and the handwriting have not, and could not have, been contested before their Lordships.

It will be convenient to set out the relevant portions of the three letters. The first is in the handwriting of Mst. Mehr Taja :

> Greetings to thee, O my sweetheart. Mind not in the least if I have been hard on thee at times—pray forgive me for the same. In fact I feel offended when ill is spoken of thee. Khan Khela who had visited my house when Amir Jan was suffering from pain had a lot of talk against thee, but beware and lend not thy ears to these. They are archdevils. Partake not of anything from their hands. Now I shall sell myself and do this act if only I have thee at my back. What a blissful hour it would be when with Amir Jan wailing over Ali Askar we contract our Nikah and enjoy ourselves. Be not angry, my darling, for thy sorrow makes me sad. However hard on thee I have been in the past, that is all past. Henceforth I solemnly promise to desist. I do fervently cherish the hope that God will make thee mine. Try and send Mir Aftab often to me so that I may talk to him. I have found out money for thee but thou must unhesitatingly find out the man. My heart is bursting for thee and I long for thee immensely. In the end accept my greetings.

The second letter is also in Mst. Mehr Taja's handwriting :

> Letter to the sweetheart. Peace be on you. The fact, my darling, is that I am in great distress : otherwise I would not have conveyed thee such harsh things. I say these to thee for I am extremely distressed. Whom but thee have I as my own in this land of the Lord ? . . . I have a lot to tell you but I am helpless. For God's sake spare not a moment or thou wilt ever repent my loss. They are all one against me. It would be better if aught thou couldst do. Accept greetings.

The third letter is in the handwriting of the appellant :

> My sweetheart and the bearer of my burden. If thou tauntest me in regard to my mother, what do I care for her ? I look to my God and to thee only for reliance. I cannot wait any more. For the sake of God and his Prophet, do try, or I will die. You must find out the money or I would die. Is it of my choice to be roaming about and thou be enjoying with him ? But what shall I do ? If I had my own way I would not have left you to remain with him. I am burning, and have pity on me, for God's sake. To me, the passing of each day is like months and years. Once place thyself in my charge and satiate me with the honey of thy red lips. Even if thou cuttest my head off my neck, I would still yearn for thy white breast. This is my last word if only thou wouldst attend to it. I have vowed for thy sake at many a shrine. The house of the torturer will be rendered desolate. Mirza Akbar's limbs have grown sapless after thee.

The judges in the court below have found in these letters, their authenticity being established, evidence justifying the conviction of the appellant and Mst. Mehr Taja. The judicial commissioner, in dismissing these prisoners' appeals, thus summed up the position, with special reference to the letters :

> There is a reference to Mirza Akbar by name in the letter in the handwriting of the appellant, and the name clearly refers to the writer of the document. Furthermore, the three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other, and there was a question of finding money for a hired assassin to get rid of him. Subsequently, we find that Ali Askar was shot by a man who had no motive to shoot him. In addition to this, there was the strange conduct of Mirza Akbar when Umar Sher was arrested. There is no reason for doubting the statement of the witnesses that he did request that Umar Sher should be released. It is true that in their earlier statements the witnesses did not mention this fact, but the obvious reason is that they did not attach any importance to it at the time, because they had no conception as to what was the motive for the commission of the offence.

> In my opinion there is no doubt whatsoever that these two appellants Mirza Akbar and Mst. Mehr Taja did enter into conspiracy to murder Ali Askar and that they hired Umar Sher to commit the actual murder, which he did.

The appellant's contention, however, was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the examining magistrate after she had been arrested on the charge of conspiracy. That statement, which was made in the appellant's absence, was admitted in evidence both by the trial judge and by the judicial commissioner on appeal as relevant against the appellant under sect. 10 of the Evidence Act. The judicial commissioner said that it had been argued that sect. 10 did not apply to any statement made by conspirators if the offence to commit which they conspired had actually been committed. He rejected that argument, and refused to hold that sect. 10 had that limited meaning, though he held that the evidence of the statement could not have great weight as against the appellant, since he had not had any opportunity of cross-examining Mst. Mehr Taja upon it. In their Lordships' judgment, the judicial commissioner misconstrued the effect of sect. 10.

The English rule on this matter is in general well-settled. It is a common law rule, not based on, or limited by, express statutory words. The leading case of *R.* v. *Blake* (2) illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow-conspirator contained in various documents actually used for carrying out the fraud. However, a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other. No doubt what was contained in it amounted to a statement evidencing what had been done and also the common intent with which at the time it had been done, but it had nothing to do with carrying the conspiracy into effect. Lord Denman, C.J., said that the evidence must be rejected [p. 138]:

> . . . on the principle that a mere statement, made by one conspirator to a third party or any act not done in pursuance of the conspiracy, is not evidence for or against another conspirator.

Later, Patteson, J., described it [p. 139] as "a statement made after the conspiracy was effected." Williams, J., said that it merely related "to a conspiracy at that time completed." Coleridge, J., said that it "did not relate to the furtherance of the common object." The words relied upon in sect. 10 of the Evidence Act are "in reference to their common intention." These words may have been chosen as having the same significance as the word "related" used by Williams and Coleridge, JJ. Where the evidence is admissible, it is admissible, in their Lordships' judgment, on the principle that the thing done, written or spoken was something done in carrying out the conspiracy, and was receivable as a step in the proof of the conspiracy: *per* Patteson, J., at p. 139. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy, or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle, their Lordships think that the words of sect. 10 must be construed in accordance with it, and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. It would be a very different matter, however, to hold that any narrative, statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment, sect. 10 embodies this principle. That is the construction which has been rightly applied to sect. 10 in decisions in India, for instance, in *Emperor* v. *Ganesh Raghunath* (3) and *Emperor* v. *Abani* (4). In these cases, the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy and statements made after arrest or after the conspiracy had ended by way of description of events then past. In their Lordships' judgment, the statement of Mst. Mehr Taja falls under the latter category, and was wrongly admitted.

In truth, however, the question of law is not really material in this case. The statement, so far from admitting a conspiracy with the appellant, categorically denied it. While the woman stated that the appellant had threatened to kill her and her husband if she refused to marry him, she had, she said, refused his advances, and stopped his coming to the house. Counsel for the respondent frankly admitted that, apart from the legal question, he could not rely on the statement as evidence of the conspiracy, or, indeed, on any other ground. In their Lordships' judgment, however, the admission of the statement (to which, it should be repeated, the judicial commissioner did not attach very great weight) did not vitiate the proceedings. On the material before the court, after the statement is excluded, there was evidence sufficient to justify the conviction. The terms of the letters are only consistent with a conspiracy between the prisoners to procure the death of Ali Askar. The vague suggestion that they related merely to a scheme to obtain a divorce and to raise money for that purpose is clearly untenable. The handwriting of the letters is clearly established. In those circumstances, their Lordships will follow the precedent established in

Pakala Narayana Swami v. *King-Emperor* (5), and hold that, in this case, as in that, it is impossible to say that the proceedings which ended with the conviction resulted in a failure of justice. They accordingly will humbly advise His Majesty that the appeal should be dismissed.

Solicitors: *Nehra & Co.* (for the appellant); *Solicitor to the India Office* (for the respondent).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*]

JAMES TALCOTT, LTD. *v.* JOHN LEWIS & CO. LTD., AND NORTH AMERICAN DRESS CO., LTD.

[Court of Appeal (MacKinnon, Goddard and du Parcq, L.JJ.), **July 25, 1940.**]

Choses in Action—Assignment—Equitable assignment—Notice—Sufficiency—"To facilitate our accountancy and banking arrangements."

A creditor placed the following notice upon its invoices by means of a rubber stamp: "To facilitate our accountancy and banking arrangements, it has been agreed that this invoice be transferred to and payment in London funds should be made to James Talcott, Ltd. Errors in this invoice must be notified to James Talcott, Ltd., immediately." The debtor ignored this notice, and paid the creditor. The assignee of the debt then sued the debtor for payment of the sum alleged to be assigned:—

Held (Goddard, L.J., *dissenting*): the language of the notice was not sufficiently plain to give the creditor to understand that the debt had been assigned to a third party, and the debtor was not liable to pay the money again to the assignee.

[**EDITORIAL NOTE.** The chief difficulty with the notice considered in this case is that it states its purpose to be the facilitating of accountancy and banking arrangements. The purpose of a notice intended to perfect an equitable assignment is to give the debtor notice that the creditor has assigned the debt. It is held that a notice referring to the facilitating of accountancy and banking arrangements is one which does not convey to the debtor any suggestion that the debt has been assigned, or that, if it does, it is too ambiguous to be a sufficient notice of an assignment.

As to Sufficiency of Notice of Equitable Assignment, see HALSBURY, Hailsham Edn., Vol. 4, pp. 444-455, paras. 813-835; and for Cases, see DIGEST, Vol. 8, pp. 466-468, Nos. 378-391.]

Cases referred to:

(1) *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 8 Digest 445, *205*; 74 L.J.K.B. 898; 93 L.T. 495; *revsg.*, [1904] 1 K.B. 387.

(2) *Denney, Gasquet & Metcalfe* v. *Conklin*, [1913] 3 K.B. 177; 8 Digest 467, *384*; 82 L.J.K.B. 953; 109 L.T. 444.

(3) *Lloyd* v. *Banks* (1868), 3 Ch. App. 488; 8 Digest 467, *380*; 37 L.J.Ch. 881; *revsg.* (1867), L.R. 4 Eq. 222.

Appeal by the plaintiffs from a judgment of Macnaghten, J., dated Apr. 29, 1940. The first defendants owed the second defendants £505 8*s.* for goods purchased from the second defendants. The plaintiffs claimed this amount, alleging that the debt was assigned to them by the second defendants and that the first defendants had due notice of this assignment but that, disregarding the notice, they chose to pay the second defendants, and that they were liable to pay the plaintiffs. The only question before the court was whether or not the plaintiffs had due notice of the assignment. All the material facts were agreed, and are fully set out in the judgment of MacKinnon, L.J.

W. Arthian Davies for the appellants.

Gilbert J. Paull, K.C., *Helenus P. J. Milmo* and *John Senter* for the first defendants.

The second defendants did not appear and were not represented.

Davies : The introductory words of the notice are quite irrelevant. They are a mere preamble. The body of the notice makes it quite clear that there has been a transfer, and that unqualified authority is given to pay the plaintiffs. Any ordinary prudent business man who saw the notice would at once realise that the only persons he had to pay were the plaintiffs, that the original creditors were not to be paid, and that their right to receive the money had gone. [Counsel referred to *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.* (1), *Denney, Gasquet & Metcalfe* v. *Conklin* (2) and *Lloyd* v. *Banks* (3).]

Paull, K.C. : He who conceals does not reveal. These words may have constituted notice of some fact, but they were not plain notice of an assignment. They were so drafted as to conceal the real nature of the assignment, if, indeed, there was one. The word " assign " and the word " debt " were carefully avoided. The judge was right, therefore, in holding that the plaintiffs did not discharge the onus of proof that notice had been given, for, in order to bind a third party, notice must be plain and unambiguous.

MacKinnon, L.J. : This is a very short point, but, I think, not by any means an easy one. The second defendants, the North American Dress Co., Ltd., agreed to sell certain goods to John Lewis & Co., Ltd., the first defendants. They sent those goods to John Lewis & Co., Ltd., and sent an invoice with them. In fact, there were several instalments of goods, and there were 4 invoices. On each of the invoices sent by the suppliers of the goods, the North American Dress Co., Ltd., to John Lewis & Co., Ltd., there was a rubber stamp imposed in the following terms :

> To facilitate our accountancy and banking arrangements, it has been agreed that this invoice be transferred to and payment in London funds should be made to James Talcott, Ltd., 6-8, Sackville Street, London, W.1. Errors in this invoice must be notified to James Talcott, Ltd., immediately.

After a time, on receipt of these invoices, John Lewis & Co., Ltd., sent a circular letter to the North American Dress Co., Ltd., which the North American Dress Co., Ltd., sent on to the plaintiffs, but no reply from the plaintiffs to John Lewis & Co., Ltd., was ever sent. I think that that fact is immaterial upon the constitution of this case and upon the issues which arise on the pleadings. Subsequently, John Lewis

& Co., Ltd., paid the amount of the invoices to the North American Dress Co., Ltd., by their cheque, and the North American Dress Co., Ltd., received the money. Then the plaintiffs intervened, and made a claim on John Lewis & Co., Ltd., that the debt represented by those invoices had been assigned to them, and that, therefore, they had a right to claim that John Lewis & Co., Ltd., should pay the money to them A a second time, basing their claim upon the ground that there had been an assignment of the debt to them, and that they had given notice thereof to John Lewis & Co., Ltd.

By correspondence between the solicitors for the plaintiffs and those for the first defendants, it was agreed that that question depended B upon the construction of this clause which was stamped by the rubber stamp on the invoices. It was admitted by the solicitors for John Lewis & Co., Ltd., and it appears from a document with which I have been furnished—indeed, there is no doubt whatever—that the North American Dress Co., Ltd., had assigned those debts to the plaintiffs by a completely C formal document. The whole question in this case is whether there was such sufficient notice to John Lewis & Co., Ltd., of that assignment, as created a legal obligation on John Lewis & Co., Ltd., to pay the plaintiffs, and to pay them only, so that, though they had paid the original debt, they must none the less pay the plaintiffs over again. D

We have been referred to what is now the leading judgment upon this branch of the law in the language of LORD MACNAGHTEN in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.* (1). I do not think that it is necessary to refer to the terms of the documents there in question. They were utterly different from any of the terms in this case. The E construction put on a document in one case is of no value whatever in the construction of documents in another case, unless the documents are the same, or very nearly the same. As I say, in this case they are utterly different, but the general principle, about which LORD MACNAGHTEN uses language which has often been quoted, is to be found F at p. 462. In the Court of Appeal, LORD ALVERSTONE, L.C.J., had said, at p. 392:

> The document does not, on the face of it, purport to be an assignment, nor use the language of an assignment.

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That is dealing with a document creating the assignment there. There is no doubt that in this case there was a very complete formal assignment, using that actual word. However, dealing with the question as to the document which creates an assignment, LORD MACNAGHTEN said, at p. 462: H

> An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission.

Those are all statements with regard to the nature of the document which must create the assignment. As I say, in this case there is no question that there was an undoubted assignment of the debt to the plaintiffs. The material passage is this, at p. 462:

> The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril.

That passage is repeated in very similar language by Atkin, J., in *Denney, Gasquet & Metcalfe* v. *Conklin* (2), at p. 180:

> It may be that the section [of the Judicature Act] is not complied with unless the notice further proceeds to bring to the notice of the debtor with reasonable certainty the fact that the deed does assign the debt due from the debtor so as to bind the debt in his hands and prevent him from paying the debt to the original creditor.

One may have a notice to a debtor from his creditor asking him to pay the money to a third party. The terms of it may be such as to indicate that it is to be paid to that third party because that third party has, by virtue of an assignment, become the person entitled to receive it. On the other hand, it may be a request to pay the debt to a third party, not because that third party has a right to it, but because, as a matter of convenience, the creditor desires that it shall be paid to that third party as his agent to receive it in respect of the right of the creditor still surviving to receive the debt himself. Plainness of meaning is necessary in order that the debtor who has received a notice to pay a third party shall be rendered liable to pay the money over again if he disregards the notice. The language is immaterial if the meaning is plain, but that plain meaning must be that the debt and the right to receive it have been transferred to the third party. It is not merely that I have made some arrangement by which I request another to pay this money to the third party as my agent. The question is whether this stamped clause put upon the invoices did amount to a plain intimation to the first defendants that the right to receive this money had been transferred to the plaintiffs.

First of all, it is not a notice sent by the plaintiffs at all. If it were sent direct by the plaintiffs to the first defendants, the mere fact that it emanated from them would go some little way to indicate that they were doing so pursuant to a right of theirs. I do not say that there is very much in that, but the fact that it is stamped on their own invoice by the North American Dress Co., Ltd., makes it a communication from them, and not a communication from John Lewis & Co., Ltd., to the plaintiffs. The words are these:

> To facilitate our accountancy and banking arrangements, it has been agreed that this invoice be transferred to and payment in London funds should be made to James Talcott, Ltd. . . . Errors in this invoice must be notified to James Talcott, Ltd., immediately.

It would have been so simple for James Talcott, Ltd., to give a correct notice, "This debt has been assigned to us," or to insist that the North American Dress Co., Ltd., should in clear terms give that intimation, that it is a matter of extreme wonder and speculation why this stamp should have been couched in this extremely vague and obscure language.

We have been told (I think that it appears from one of the letters) that the wording of this extraordinary sentence was actually settled by counsel. I can only conceive that it was couched in this obscure language to conceal the fact that the North American Dress Co., Ltd., were carrying on their business with borrowed money, and had assigned to the plaintiffs the money to which they themselves were entitled.

The words begin—and they are the first words to be read by anybody who did read them—"To facilitate our accountancy and banking arrangements . . ." The word "our" suggests that it is still a debt due to the North American Dress Co., Ltd., and that it is only a matter of their internal business arrangements. It is true that the words go on "it has been agreed," and it is suggested that that must mean an agreement between the North American Dress Co., Ltd., and the plaintiffs, though I do not know why it should. There is nothing to show that it has been agreed between those parties. There are the vague, uncertain words "it has been agreed." Then it goes on to say "that this invoice be transferred to." It is suggested that those words in themselves ought to be taken to mean that the debt due upon this invoice shall be assigned, but they do not say so. The invoice is transferred:

> . . . and payment in London funds should be made to James Talcott, Ltd. . . . Errors in this invoice must be notified to James Talcott, Ltd., immediately.

As I have said, it is not enough to make the debtor liable to pay over again if he has creditors, if he has merely received a notice that he is to pay to some other party merely as agent for his creditor. He is not bound to pay over again unless he has received a sufficiently plain notice that the right to receive the money has been transferred to the third party, so that he will at his peril neglect that notice and neglect the right of the third party. I think that this notice stamped on the invoice was ambiguous. I think that it is equally consistent with being merely a request to pay to the plaintiffs, as agents of the creditor to receive the money, and it does not indicate sufficiently clearly that there has been an assignment of the debt to the plaintiffs so that they should become the real creditors of the first defendants, be the only persons entitled to be paid the money. That was the view taken by MACNAGHTEN, J., with the result that he dismissed the claim. I think that his decision was right, and that this appeal fails.

GODDARD, L.J.: I have the misfortune to differ from MACKINNON, L.J., and MACNAGHTEN, J. I do so only with great hesitation, but, as I have formed a very clear opinion, assisted, I may say, by the very clear and forcible argument of counsel for the appellants, I think that I must express my opinion of dissent. The law of this country allows a creditor to assign his debt to a third party. If the debtor receives notice of that assignment, he must pay the assignee. If he pays the assignor, he does so at his peril. If the assignor does not account to the assignee for the money, the debtor will have to pay a second time. Notice may be given by the assignor or by the assignee. For myself, I think that the fact that the notice is given by the assignor may strengthen the position, as far as the debtor is concerned, in this way. I should not draw any inference which is adverse by reason of the fact that it is given by the assignor, because, if the debtor gets a notice from B telling him to pay B the money he owes to A, he will naturally want to know if he is safe in doing so, and he will apply to A, the assignor. If he gets a notice from the assignor, then, of course, he can safely pay, because he will be paying in accordance with the directions of his creditor.

The only question in this case is whether there was a notice to John Lewis & Co., Ltd., that this debt which they owed the North American Dress Co., Ltd., had been assigned to the plaintiffs. I need not read again the passage which MACKINNON, L.J., has read from the opinion of LORD MACNAGHTEN in *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.* (1). It is clear from that opinion, however, that the words used need not be the words which describe the transaction which has taken place between the assignor and the assignee as an assignment. As LORD MACNAGHTEN put it, all that is necessary is that the debtor shall be given to understand that the debt has been made over by the creditor to some other third person. Earlier in his opinion LORD MACNAGHTEN called attention to an answer given in cross-examination by the manager of Dunlops. The manager of Dunlops was asked:

> Supposing that you had received that direction sent on by the Brandt's, you would have thought, would you not, that Brandt's had a charge or were interested in this money ?—I think I would. I would have thought that there was some such arrangement.

There was no evidence given in this case, but, if the manager of John Lewis & Co., Ltd., had gone into the box and had been asked that question, I confess that I should have been surprised if he had given any answer other than that given by the manager in the *Dunlop* case (1). What are the words here ? At the moment, I leave out the opening sentence, which has been so much stressed. The words are:

> . . . it has been agreed that this invoice be transferred to and payment in London funds should be made to James Talcott, Ltd. . . .

If this is a mere direction or a request, it is a direction or request made because there has been an agreement. Whom is the agreement between ? Quite obviously between the North American Dress Co., Ltd. and the plaintiffs. It has been agreed between those parties "that this invoice be transferred to James Talcott, Ltd." That is an ungrammatical expression. I do not know that it is more ungrammatical than many expressions which one finds business men using. When one has a Lloyd's policy to consider, it is sometimes very difficult to understand exactly what it means from the point of view of strict grammar, especially where one finds, as one often does, a policy executed on a marine form talking about ships, when in fact the policy has nothing whatever to do with a marine adventure.

I do not think that anybody who took the trouble to read this, and who applied his mind to it, would have any doubt that the words "this invoice be transferred to" must mean "the interest in this invoice" or "the amount due under this invoice." Then it stands as a matter of agreement between the North American Dress Co., Ltd., and James Talcott, Ltd., that the interest under this invoice has been transferred to them "and payment in London funds should be made to James Talcott, Ltd." I suppose "payment in London funds" means payment in London, payment in sterling. I think that, if anybody read that and thought about it for a moment, it would be clear to him that he was being asked to pay the money due to James Talcott, Ltd. That is the first thing. That is not enough. I may ask my debtor to pay my banker what he owes me. That does not mean that I assign the debt to the banker. However, if I say to him: "It has been agreed that the invoice [by which I think anybody must understand the interest under the invoice] has been transferred to my banker, and, therefore, I ask you to pay the money to the banker," then the only construction which anybody who applied his mind to it could put upon it is, I think, that the banker had a charge on, or was interested in, the money.

I cannot see myself that the statement that the agreement has been made "to facilitate our accountancy and banking arrangements" has anything to do with it, or destroys the other part of the sentence. The reason why a man assigns a debt matters not to the debtor. He may assign it for good reasons or for bad reasons. He may assign it for any reasons he likes. It does not matter why he assigns it. The question is whether or not he has told the debtor that the assignee has got an interest in the money.

I do not say that this is an easy case, and I think that much clearer words could have been used, but, in my opinion, the words are clear enough to indicate the position to John Lewis & Co., Ltd., if they ever thought about it. Probably the reason why they did not pay the plaintiffs was that they ignored the notice and never thought about it. I think that it is enough to tell them that the plaintiffs had a charge on, or were interested in, the money, and, therefore, for my part, I would allow this appeal.

du Parcq, L.J.: The question in this case is whether or not the notice stamped on the invoices which are before us was a notice of an assignment of the debt by the North American Dress Co., Ltd., to James Talcott, Ltd. That it is not an easy question is apparent from the fact that MacKinnon and Goddard, L.JJ., take different views as to the correctness of the judgment of Macnaghten, J. As there is that difference of opinion, I think that it is desirable that I should state my own view in my own words as shortly as may be.

It is plain that the notice relied upon is a clear notice that it is desired that payment should be made to James Talcott, Ltd., and not to the original creditor. As has been said—indeed, it is obvious—the notice to pay the plaintiffs a debt is not necessarily a notice that the debt has been assigned to the plaintiffs. A notice to pay a debt to a third person
A may be given in words which show that there has been an assignment of the debt. It may be given in words which show that there has not been an assignment of the debt. It may be given in words which leave it in doubt whether or not there has been an assignment of the debt. If those words are in the first category, the plaintiffs succeed. If the words
B are in either of the other categories, the plaintiffs fail. I say either of the other categories, because it is not enough that the notice should be capable of being understood to mean that the debt is assigned. It must be plain and unambiguous, and not reasonably capable, when read by an intelligent business man, of a contrary construction.

C Looking at the matter from that point of view, I should agree with GODDARD, L.J., if it were not for the fact that the notice begins with these words, which were relied on—and properly relied on, I think—by the judge: "To facilitate our accountancy and banking arrangements." Leaving those words out, I think that one would say that,
D although the language is not well-chosen, there is a clear statement of an assignment. One would be a little puzzled by the words "that this invoice be transferred." One would be inclined to say that they mean "that the debt to which the invoice refers is transferred." It is strange, one would think, that the draftsman has used the word "invoice"
E instead of the word "debt," but that must be what it means. However, I attach much more importance to those earlier words than does GODDARD, L.J. The notice begins in effect by saying: "What follows has been agreed upon for one reason, and for one reason only—namely, to make it easier to keep our accounts and to make our transactions with our
F bankers simpler." I think that anyone reading that may be pardoned for saying that that shows that there is no transfer of the debt. The fact that the arrangement or agreement is directed to the simplification of the accountancy and the banking arrangements of the North American Dress Co., Ltd., points very clearly to the fact that they are still the
G creditors and the money is due to them. Therefore, when I read that, and find that the invoice is transferred, what must be meant is that further dealing with this invoice if, in any particular, I have any complaint to make about it, is to be a matter between myself and James Talcott, Ltd. At any rate, that is the desire of the North American Dress Co., Ltd., but
H the debt is still due to the North American Dress Co., Ltd., because it is in order to save them from some difficulties in the matter of bookkeeping, which would involve entries of this debt and payment into the bank of the money when they received it, that the agreement has been entered into. I am far from saying that it is clear from this notice that there has not been an assignment of the debt. It may be that a business man

might have suspicions about it in his mind. How far he has suspicions may depend very much on his knowledge of the parties concerned. However, I do find it impossible to say—and in this I am in agreement with MacKinnon, L.J., and Macnaghten, J.,—that this is a plain and unambiguous notice that there has been an assignment of the debt. Macnaghten, J., directed his mind to the precise point, and cited the one material passage from the decision in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.* (1) in the opinion in the House of Lords. He felt that the notice was ambiguous. Notwithstanding the judgment of Goddard, L.J., by which, of course, I am impressed, and, I will add, notwithstanding the very able argument of counsel for the appellants, I cannot bring myself to think that there is ground here for saying that the judge was wrong, and I therefore agree with MacKinnon, L.J., that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Lovell, White & King* (for the appellants); *Charles Russell & Co.* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re LIDINGTON, LIDINGTON *v.* THOMAS AND OTHERS.

[Chancery Division (Farwell, J.), **July 5, 24, 30, 1940.**]

Wills—Family provision—Wife entitled to annuity under separation deed—Annuity ceasing on death of husband—Wife having custody of infant children—" I leave nothing whatsoever to my wife "—Inheritance (Family Provision) Act, 1938 (c. 45), *ss.* 1, 2, 4.

By his will, dated June 30, 1936, the testator made no provision for his wife, which fact was expressly stated in the will. The value of the estate was about £2,000. The testator left a life interest in a quarter share of his estate entirely outside the family. By a separation deed, dated June 1, 1937, the testator covenanted to pay " during the continuance " of the deed an annual sum to his wife and to contribute towards the maintenance of the infant children, of whom the wife was to have the custody. The wife claimed that she was entitled to receive the payments under the deed after the death of the testator. Alternatively, if she was not so entitled, she asked that an order for reasonable provision for her maintenance be made, pursuant to the Inheritance (Family Provision) Act, 1938, s. 1:—

Held: (i) on the construction of the separation deed as a whole, the payments made thereunder ceased on the death of the testator.

(ii) the application lay within the Act, and an order should be made that, until further order, the plaintiff should be paid two-thirds of the income of the net estate as a whole, she undertaking to maintain the children during infancy. The testator's disposition of the life interest in a quarter of the estate should remain untouched.

[EDITORIAL NOTE. It is here thought that the testator, in making no provision for his widow, was acting under the impression that his estate would be liable to continue the payments under the separation deed. The deed was one under which the widow undertook the maintenance of two infant children, and the court has thought it proper to make an order under the Act for part of the income of the estate to be paid to the widow.

As to the Inheritance (Family Provision) Act, 1938, see HALSBURY, Hailsham Edn., Supp., Wills, para. 1029. For the Inheritance (Family Provision) Act, 1938, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 31, pp. 149, *et seq.*]

Adjourned Summons (i) to determine whether, upon the true construction of the separation deed, dated June 1, 1937, and made between Harry Lidington, the testator, of the one part, and Daisy Lidington, the plaintiff, of the other part, the liability of Harry Lidington to maintain payments under the deed ceased on his death, or whether his estate remained liable to continue their payment for the life of the plaintiff, and (ii) for an order that such reasonable provision as the court thinks fit should be ordered to be made out of the net estate of the testator for the maintenance of the plaintiff.

G. D. Johnston for the plaintiff.

W. T. Elverston for the first defendant.

E. M. Winterbotham for the second defendant.

A. G. Coulson for the third and fourth defendants.

D. Markwick for the fifth defendant.

Farwell, J.: This summons originally came before me, when the only question which was raised upon it was whether or not this was a case in which the Inheritance (Family Provision) Act, 1938, applied, and whether or not, in all the circumstances, the widow of the testator was entitled to some allowance for maintenance, because under the will of the testator she took nothing, and in fact at the end of his will the testator inserted these words: "I leave nothing whatsoever to my wife Daisy Lidington." In those circumstances, the widow has taken out this summons asking the court to make some provision for her out of the estate of the testator. During the argument, the question arose whether a deed of separation which had been entered into between the husband and the wife was still a subsisting deed, or whether in fact it came to an end on the death of the husband. That seemed to me to be a question which ought properly to be decided before I finally decided the other question on the summons. If that question as to the deed were decided in favour of the wife, and, on the true construction of the deed, the obligations under it undertaken by the husband continued during the life of the wife notwithstanding the husband's death, then I apprehended that the application under the Inheritance (Family Provision) Act, 1938, would no longer be made, and it seemed to me that, therefore, it would be more convenient to have the question of the construction of the deed disposed of before dealing with the other question, if that should be necessary. Accordingly, at my direction, the summons stood over and was amended in order to raise this question of the construction of the deed. The matter was not originally raised, because, under the Act, the summons had to be taken out within a short period, and it was thought that the most expeditious way of bringing the matter before the court was simply to raise the question of the Act, and not to challenge the view that the husband's liability under the deed had terminated. The matter is before me, and I have to determine it. I do not think that it is a question wholly without difficulty. The separation deed, which is dated June 1, 1937, is made between Harry Lidington, the husband, of the first part, and Daisy Lidington, his wife, of the other part. It recites the marriage, and then continues as follows:

> Whereas unhappy differences have arisen between them by reason whereof they are unable to live harmoniously together and they are desirous of separating the one from the other upon the terms hereinafter expressed: (1) the parties hereto shall henceforth live separate and apart one from the other and neither of them shall during the continuance of this deed at any time or in any manner directly or indirectly molest disturb or interfere with the other of them or any person or persons with whom he or she may be residing for the time being. (2) The husband will during the continuance of this deed pay to the said wife by equal monthly payments in advance the sum of £130 per annum without any deduction for income tax or any other deduction whatsoever for her maintenance and support the first of such payments to be made when the wife vacates the said premises No. 28 Foscote Road aforesaid in accordance with cl. 9 hereof. Provided always that if the said wife shall at any time be guilty of scandalous or unchaste conduct or commit any serious or persistent breach of any stipulation on her part herein contained all liability of the said husband under this clause shall immediately cease and determine. (3) The husband agrees that the wife shall have the custody of the two said children of the marriage the husband to have reasonable and proper access to the child John Henry Peter at all times for reasonable periods at reasonable times with a maximum of one-half of each school holiday and for 4 days during each alternate Christmas and bank holidays which period shall be counted as part of the half-period of each school holiday. The husband is also to have access to the child Michael Geoffrey Stephen for at least one week-end in every month and for one day in each week and further for the same access as in the case of John Henry Peter so soon as Michael Geoffrey Stephen shall attend boarding-school, which shall not be before he reaches the age of 10 years. The husband further is to have the full control of the choice of schools and education for the children but shall not choose a day school for Michael that is not situate conveniently near the place where the wife may be living. Provided always that the husband shall not take either of the said children out of the country. (4) The husband agrees to pay all schooling fees for the said children and further to pay to the wife the sum of 10*s*. per week for the child John Henry Peter whilst he is on holiday and residing at the home to be provided by the wife and also the sum of 15*s*. per week in advance for the child Michael Geoffrey Stephen the payment of such latter sum to commence from the date when the wife vacates [certain premises]. (5) The husband will during the continuance of this deed pay all proper fees incurred for medical attention upon the said children and medicine and other items ordered by the medical attendant the husband to approve first of such medical attention except in cases of emergency. The wife in this connection undertaking to notify immediately the husband in the case of any such illness and to give all reasonable and proper access during such illness at reasonable times to such child or children apart from the access hereinbefore provided for.

Then cl. 6 provides for the wife keeping certain chattels and certain other things, and she undertakes

> . . . to provide and maintain for herself and the said children a home which is not to be at or with any of the wife's immediate relations such home to be consistent with her income under this deed.

Then the deed continues as follows:

> 7. The wife shall not at any time during the continuance of this deed contract or purport to contract any debt as agent for the husband or under any circumstances so as to expose the said husband to any liability for such debts. 8. The wife shall not nor shall any person or persons on her behalf at any time hereafter molest or disturb the said husband or by any means either by taking out or process or by instituting any action or in any other manner compel the husband to cohabit with the wife or endeavour to enforce any restitution of conjugal rights or to compel the husband to allow her any maintenance further than provided for by the deed.

Then cl. 9 provides for vacating the named premises and provides that the husband shall pay £10 towards the removal expenses, and cl. 10 provides for certain proceedings for judicial separation coming to an end.

The question which I have to determine is whether, on the true construction of this deed, it continues to operate notwithstanding that the
A husband is dead, so long as the wife is alive. I think that the tendency of the courts—of this court, at any rate—in construing separation deeds of this nature is to approach the question of construction with a view to seeing whether or not the parties were intending that there should be some permanent provision for the wife during the remainder of her life,
B notwithstanding that her husband might die before she did. I think that the tendency of this court is in favour of an obligation which continues during the whole life of the wife notwithstanding that the husband may die. However, that is only a tendency, and one cannot, of course, give effect to it if the language of the document is to the contrary effect.
C In the present case, I have come to the conclusion that this deed, on the whole, is not one which was intended to continue beyond the joint lives of the husband and wife. I think that the deed as a whole contemplates throughout that the arrangements which are being made between the husband and the wife are arrangements which are to obtain during the
D joint lives, and the reference to "the continuance of the deed" seems to me to point to the construction that neither party contemplated that the deed would continue as a binding obligation upon the other party in the event of one of them dying. Speaking for myself, I should have liked to have been able to come to a contrary view to that at which I have
E arrived, but the language of the deed, in my judgment, does indicate reasonably clearly that the parties were not making any arrangement which either of them considered would continue beyond the joint lives of the spouses. It is difficult to put a very exact meaning on the phrase "during the continuance of this deed," used, as it is, in some clauses and
F not in others, but, when one looks at the terms of the deed itself, there are undoubtedly strong indications which seem to me to point to the provision coming to an end on the death of the husband. The provisions with regard to the children, for instance, I think do point reasonably clearly to their being provisions which are to be binding only so long as the
G husband is alive, and I find it impossible to separate the deed into parts, so as to hold that the obligation to pay the £130 per annum continues during the life of the wife notwithstanding the husband's death. The obligation with regard to the children seems to me to indicate quite clearly that those objects, at any rate, are to be limited, and, as I think, must be
H limited, either to such period as the children are necessarily dependent on the wife, and the husband is under an obligation, or may be under an obligation, to maintain them, or to the period when the marriage comes to an end by reason of the death of the husband. On the whole, I have come to the conclusion that, in this particular case, in the matter of the construction of this particular deed, the obligation which the husband

undertook to make payments to his wife on her own behalf and on behalf of the two children did cease and determine on his death. That leaves the position that the wife is completely unprovided for, and it may be that, in those circumstances, she is entitled to move under the Inheritance (Family Provision) Act, 1938.

I may add that this summons was amended, as I have already stated, at my instigation and at my request, and it does not seem to me that the fact that I have come to a conclusion adverse to the wife on the question of construction ought to prejudice in any way any question as to the additional costs incurred by raising this question, nor, of course, can it prejudice in any way the question whether or not she ought to be made some allowance under the Inheritance (Family Provision) Act, 1938, having regard to the fact that her husband has left her completely unprovided for, although during his own lifetime he paid her, under this deed, a sum of £130 per annum, with certain additional sums under the deed for the two children. Therefore, I must answer the question in the summons which raises the question of the construction of the deed in the negative.

The second question which I have to determine is whether or not the widow, who is admittedly unprovided for under the will of her husband, is entitled to the assistance of the court under the Inheritance (Family Provision) Act, 1938. It is not possible to ascertain the value of the testator's estate at present. The net value, as appears from the probate valuation, is some £3,600, but there is a liability under a lease, which, if the rent under that lease has to be paid during the remainder of the term, which is some 4 years, will have the result of reducing the net value of the estate to something under £2,000, so that I am not in a position now to know with any certainty what the estate will ultimately prove to be worth. I certainly cannot now make any order on the assumption that the estate will be less than £2,000, because, of course, it may be that, if the parties are fortunate, it will be possible to escape some of the liability under this lease, in which case the estate might prove to be of a value greater than £2,000.

By his will, dated June 30, 1936, the testator left to one K. a life interest in one quarter of his estate. That lady is not a dependant in any sense within the meaning of the Act, and must be treated as a stranger to the family. Then he disposes of the goodwill of his business to one Seymour, with a certain undertaking to which I need not refer. Then he gives the whole of his estate, including the quarter of the estate which he has given for the use of K. for her life:

> . . . to be held in trust for the benefit of my sons referred to by my above appointed trustees until they arrive at the age of 28 years and in the event of one dying before arriving at that age his share shall go to the other. . . .

Then, if both die before they are 28 years of age:

> . . . and before the death of K. then the quarter above referred to shall go to K. absolutely and the residue divided equally between any children of my brother Ernest or my sister Gladys Annie.

Then the last sentence but one of his will is: "I leave nothing whatsoever to my wife Daisy Lidington."

I now turn to the Act, sect. 1 of which provides as follows:

> (1) Where, after the commencement of this Act, a person dies domiciled in England leaving (*a*) a wife or husband; (*b*) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself; (*c*) an infant son; or (*d*) a son who is, by reason of some mental or physical disability, incapable of maintaining himself; and leaving a will, then, if the court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in this Act referred to as a dependant of the testator) is of opinion that the will does not make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the testator's net estate for the maintenance of that dependant: provided that no application shall be made to the court by or on behalf of any person in any case where the testator has bequeathed not less than two-thirds of the income of the net estate to a surviving spouse and the only other dependant or dependants, if any, is or are a child or children of the surviving spouse. (2) The provision for maintenance to be made by an order shall, subject to the provisions of subsect. (4) of this section, be by way of periodical payments of income, and the order shall provide for their termination not later than (*a*) in the case of a wife or husband, her or his re-marriage . . . (*c*) in the case of an infant son, his attaining the age of 21 years; (*d*) in the case of a son under a disability, the cesser of his disability; or, in any case, his or her earlier death. (3) The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say: (*a*) if the testator leaves both a wife or husband and one or more other dependants, two-thirds; or (*b*) if the testator does not leave a wife or husband, or leaves a wife or husband and no other dependant, one-half.

In the present case, the testator left a wife and one or more other dependants living—that is to say, persons who are relations to himself, either his wife, or a daughter, or, as in this case, an infant son. In my judgment, on the true construction of that subsection, the effect of it is that the court has no power to benefit a person who is a dependant to a greater extent than by providing the income of, in this case, two-thirds of the whole estate. Thus, the dependants are not to get, either under the will or under the order made by the court, or a combination of both, more than the benefit arising out of two-thirds of the estate, and the remaining part of the estate is to be free for the testator to dispose of as he pleases. Thus, the court cannot deprive persons who are not dependants to any greater extent than is provided by the Act. That is to say, I think, the word "dependant," as there used, means the persons who are defined in the Act, whether or not provision is made for them, and, in ascertaining the fraction, the court has to take into account, not only that which the testator has given to dependants by his will, but also any provision which the court thinks fit to make under the Act. Sect. 1 of the Act continues as follows:

> (4) Where the value of a testator's net estate does not exceed £2,000, the court shall have power to make an order providing for maintenance, in whole or in part, by way of a payment of capital, so however that the court, in determining the amount of the provision, shall give effect to the principle of the last preceding subsection. (5) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order, the court shall have

> regard to the nature of the property representing the testator's net estate and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the testator's dependants and of the person who, apart from the order, would be entitled to that property. (6) The court shall, on any application made under this Act, have regard to any past, present or future capital or income from any source . . .

Then the Act provides that the court shall have regard to the testator's A wishes within reason, so far as they are ascertainable from the provisions he has made. I do not think that I need refer to any other section except sect. 4. I should have said that sect. 2 provides as follows:

> (1) Except as provided by sect. 4 of this Act, an order under this Act shall not be made save on an application made within 6 months from the date on which B representation in regard to the testator's estate for general purposes is first taken out.

This summons was taken out within the limited period. Sect. 4 provides as follows:

> (1) On an application made at a date after the expiration of the period specified C in sect. 2 of this Act, the court may make such an order as is hereinafter mentioned, but only as respects property the income of which is at that date applicable for the maintenance of a dependant of the testator, that is to say—(*a*) an order for varying a previous order on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant or of a person beneficially interested under the will in the property; or (*b*) an order for making provision for the maintenance D of another dependant of the testator. (2) An application to the court for an order under para. (*a*) of the preceding subsection may be made by or on behalf of a dependant of the testator or by the trustees of the property or by or on behalf of a person beneficially interested therein under the will.

Then sect. 5 provides for the interpretation of expressions in the Act, but I do not think that I need refer to it. E

In the present case, as I have said, I do not think that it is open to me to deal with anything except the income, because at the present time it cannot be ascertained whether or not the capital value of the testator's estate exceeds £2,000. I am satisfied, however, that this is a case where some provision should be made for this plaintiff. The testator has left F her nothing by his will. During his lifetime he covenanted to pay, and, as far as I know, he did pay, £130 per annum, plus certain sums for the maintenance and benefit of his children. On the construction which I felt bound to put on the separation deed, that provision for his wife has wholly determined. It may be that, when the testator came to make his G will, he thought that the provision which he had made for his wife under the deed would continue during her life, and that that was the reason why he left her nothing by his will. There may have been other reasons. It seems to me, however, that this is one of the cases in which this Act was intended to be applied. I think that it would be wrong of me to H say, having regard to the terms of the will, that this is not a case where some sort of provision should be made for the widow. She has two infant children, who are both, I understand, living with her, and she is maintaining them, and has looked after them and maintained them since the separation took place. The husband's payments were made towards that maintenance. The widow has undertaken that obligation, and she is maintaining them. In the circumstances, I think that it is necessary in this case to accede to the application, and the course which I am proposing to take is to direct that the income of two-thirds of the estate is to be applied by paying that amount to the widow, she undertaking thereout to maintain the two children during their infancy. This is not an application by or on behalf of the children, but I am entitled, it seems to me, to impose, as a condition of giving the wife any benefit under the Act, an obligation to maintain the children, and that is what I propose to do. I propose also to give the widow, the plaintiff, and I think I must give the trustee, liberty to apply. If it turns out that the estate is under £2,000, it may be that the court will think fit then to make some alteration in the provision which it is now making, as far as it can, for the widow. Such an application would certainly be within sect. 4 of the Act, but, in any event, I am satisfied that the court has jurisdiction to give liberty to apply. If and when the matter ever comes before the court again, if the court is satisfied that there is sufficient alteration in the situation, it will then be able to regulate matters accordingly. The direction to pay the income to the widow will, of course, be limited to her widowhood, because the Act itself provides for that, and I think that it will also be limited to the period during which both the children are under age. As soon as the eldest comes of age, I think that an application will have to be made to the court. It may be that, in the circumstances which then exist, some alteration in the provision which I am now making ought to be made.

Taking the difficult position of a small estate and a widow left completely unprovided for, and two children who can only be provided for under the statutory powers so far as they are concerned, I think that the proper order to make is that which I have indicated. It will provide for the immediate future, and will give an opportunity, if circumstances alter, for the application to be renewed. I should say that, if it becomes necessary for a further application to be made to the court, I do not see any necessity, as at present advised, for any person being represented before the court other than the plaintiff, the executors, and I think, the two children. As the lady who takes the income of one-quarter of the estate will not be affected by what I am doing, I do not think that she will have any interest in any application which is subsequently made. As far as the income of the one-quarter of the whole estate is concerned, that will go to the lady. I am not interfering in any way with that. As far as the rest of the estate is concerned, I am proposing to direct that the income of two-thirds of the estate shall be paid forthwith to the plaintiff until further order, she undertaking to maintain the two children during their infancy. There will be liberty to apply, and I think that I must make a further order to tax the costs of the summons, including the costs of the amendment. I am not proposing to make any difference with regard to them. Those costs will be taxed as between solicitor and client, and will have to come out of the estate.

Order that two-thirds of the income be paid to the plaintiff until further order. Costs to come out of the estate.

Solicitors: *Emanuel & Simmonds* (for the plaintiff and for the third, fourth and fifth defendants); *Ernest Bevir & Son,* agents for *H. Bevir & Son,* Wootton Bassett (for the first defendant); *Wallace Terry & Co.* (for the second defendant).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

E. H. JONES (MACHINE TOOLS), LTD. *v.* FARRELL AND MUIRSMITH.

[Chancery Division (Bennett, J.), **August 2, 1940.**]

Emergency Legislation—Emergency powers—Power to make regulations authorising taking possession or control of undertaking—Regulation authorising carrying on of undertaking—Ultra vires—Emergency Powers (Defence) Act, 1939 (*c.* 62), *s.* 1—*Defence (General) Regulations,* 1939 (*S.R. & O.,* 1939, *No.* 927), *reg.* 55 (4).

The plaintiff company carried on the business of making machine tools. All the share capital, except three shares held by his son, was owned by E. H. J. On July 17, 1940, E. H. J. received a letter from the Ministry of Supply stating that, pursuant to the Defence (General) Regulations, 1939, reg. 55 (4), the defendants were authorised by the Ministry to carry on the company's undertaking from that date. On the same day, an order was given to the company's bankers instructing them not to operate the company's account. The company claimed that the order was made under a regulation which was invalid, and that it was made in a manner which was wholly unreasonable. They asked that an injunction should be granted to restrain the defendants until judgment or further order from interfering in any way with the control and management of the company or its banking account:—

Held: the Emergency Powers (Defence) Act, 1939, s. 1 (2), authorised the making of regulations to take "possession or control" of an undertaking, but not to "carry on" an undertaking, and the Defence (General) Regulations, 1939, reg. 55 (4), made under the powers of that subsection, was, therefore, *ultra vires* and invalid.

[EDITORIAL NOTE. This case deals with what appears to be either an oversight or an omission in the drafting of the Emergency Powers (Defence) Act, 1939. Sect. 1 (2) (*b*) (i) authorises the government to take possession or control of any undertaking, and it is here held that this does not give any power to carry on the undertaking after the possession or control has been taken. A regulation authorising the carrying on of an undertaking was, therefore, held to be *ultra vires.*

As to Requisition of Property Other than Land, see BUTTERWORTHS' EMERGENCY LEGISLATION, Statutes, pp. 256, 257, and Regulations [13] 70*b*-72.]

Cases referred to:

(1) *Lipton, Ltd.* v. *Ford,* [1917] 2 K.B. 647; 11 Digest 550, *527*; 86 L.J.K.B. 1241; 116 L.T. 632.

(2) *Raleigh* v. *Goschen,* [1898] 1 Ch. 73; 39 Digest 340, *265*; 67 L.J.Ch. 59; 77 L.T. 429.

(3) *China Mutual Steam Navigation Co.* v. *MacLay*, [1918] 1 K.B. 33; 11 Digest 549, *521*; 87 L.J.K.B. 95; 117 L.T. 821.

(4) *R.* v. *Halliday*, [1917] A.C. 260; 11 Digest 552, *539*; 86 L.J.K.B. 1119; 116 L.T. 417.

(5) *The Zamora*, [1916] 2 A.C. 77; 37 Digest 652, *1071*; 85 L.J.P. 89; 114 L.T. 626.

(6) *Sheffield Conservative & Unionist Club, Ltd.* v. *Brighten* (1916), 85 L.J.K.B. 1669; 11 Digest 548, *509*.

MOTION for an injunction to restrain the defendants until judgment in this action or further order from interfering in any way with the control or management of the business and affairs of the plaintiff company or its banking account and for an order that the defendants may be ordered to withdraw any instructions given by them to the plaintiff company's bankers not to honour any cheques drawn in the ordinary course of business. The facts are fully set out in the judgment.

W. P. Spens, K.C., and *M. J. L. Beebee* for the plaintiffs.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *H. O. Danckwerts* for the defendants.

Spens, K.C.: There are two grounds for challenging the action of the Ministry. In the first place, the validity of the regulation under which the plaintiff company were ordered to hand over their business is disputed. Its effect is to override the articles and memorandum of the company. It is *ultra vires* and a trespass: *Raleigh* v. *Goschen* (2), *China Mutual Steam Navigation Co.* v. *MacLay* (3). In the second place, even if the regulation is valid, the acts done are not within the powers of such regulation. Pending the trial of the action, the plaintiff company's banking account has been stopped, and strangers have been put in control to carry on the company's business, which will have a damaging effect on the affairs of the company. In fact, one of those put in control is actually a trade rival, and this may affect the company prejudicially. In the light of these events, it cannot be said that the Ministry has acted reasonably: *per* LORD ATKINSON in *R.* v. *Halliday* (4), at p. 272.

The Attorney-General: The regulation is valid. In *R.* v. *Halliday* (4), the question was whether the Defence of the Realm Regulations were authorised by the Defence of the Realm (Consolidated) Act, 1914, and the case was an example of the wide construction put by the courts on words such as these at a time when the country was in great danger. The Emergency Powers (Defence) Act, 1939, gives wide powers to the King in Council to make such regulations as appear necessary for the defence of the realm and the effective prosecution of the war. By sect. 1 (4) of the Act, if there is any inconsistency between a defence regulation and any other Act of Parliament, the defence regulation shall prevail, notwithstanding that there has been no express suspension of such Act. *China Mutual Steam Navigation Co.* v. *MacLay* (3) was a case which went beyond the regulation, but here the regulation authorises the carrying on of an undertaking if it is considered necessary for the effective prosecution of the war, and if it is authorised by the Act. The regulation is valid, and, if it is valid, it is unnecessary to prove that it has been reasonably exercised: *The Zamora* (5). [Counsel referred to *Lipton, Ltd.* v. *Ford* (1) and *Sheffield Conservative & Unionist Club, Ltd.* v. *Brighten* (6).]

Spens, K.C., in reply.

A

BENNETT, J.: This is a motion in an action by E. H. Jones (Machine Tools), Ltd., against Edward Charles Farrell and Eric William Muirsmith, in which the plaintiffs ask for

> . . . an injunction to restrain the defendants and each of them until judgment in this action or further order from in any way interfering with the control and management of the business and affairs of the plaintiff company or its banking account and that the defendants may be ordered to forthwith withdraw any instructions given by them or either of them to the plaintiff company's bankers not to honour any cheques drawn in the ordinary course of business upon the company's banking account. B

It appears from an affidavit of Ernest Henry Jones, the chairman C of the board of directors of the plaintiff company, and its managing director, that the company is a private company incorporated under the Companies Act in 1917 with a nominal capital of £60,000. The whole of the shares are held by Jones and his son, and it appears from para. 4 and para. 5 that for some years past the company have been D successfully carrying on a business as manufacturers of machine tools. It appears from para. 6 that in Sept., 1939, Jones, as representative of the plaintiff company, was appointed by the Machine Tool Controller a member of the advisory panel of importers to the Ministry of Supply, and from para. 7 it appears that on July 17, 1940, without any previous E warning, he received from the principal assistant secretary of the Ministry of Supply a letter, dated July 16, 1940, in these terms:

> Gentlemen, I am directed by the Minister of Supply to inform you that in exercise of the powers conferred on him by the Defence (General) Regulations, 1939, reg. 55, he has to-day authorised Mr. Edward Charles Farrell of Bridgecourt, Lady Byron F Lane, Knowle, Warwickshire and Mr. Eric William Muirsmith of 20, Grosvenor Square, London, W.1, to carry on your existing undertaking as from July 17, 1940, in accordance with the instructions of the Minister.

It also appears from the same paragraph that on the same day the plaintiff company received a telegram from Farrell and Muirsmith in these terms: G

> Reference Ministry of Supply direction July 16, 1940. Please instruct authorised responsible representative to meet us at conference room, 35, Old Queen Street, at 10 a.m. tomorrow, Thursday, July 18, 1940. Meantime you are required to carry on your business as heretofore.

Jones goes on to depose to the fact that on July 17, 1940, the plaintiff H company's bankers had been instructed not to allow the company's account to be operated, which made it impossible for the company to carry on. He deposes that on July 18, 1940, he wrote a letter to the Secretary of the Ministry of Supply protesting against the notice of July 16, 1940, and asking for an explanation. He also deposes to the fact that no reply has been received to his letter of protest. His letter of protest is in these terms:

> Dear Sir, My company are very surprised to receive your letter of the 16th inst. informing them that the Minister in exercise of the powers conferred on him by the Defence (General) Regulations, 1939, reg. 55, has authorised Mr. E. C. Farrell and Mr. E. W. Muirsmith to carry on the company's existing undertaking as from the 17th inst. My company have not previously been informed of the intention to control their business nor consulted in regard to it, and on their behalf I strongly protest against such action which is likely to have serious consequences on the company's future business. An explanation of this drastic procedure is, I think, in the circumstances not unreasonable to expect, and perhaps you will let me know the reason for the step which the Ministry has taken. I shall also be obliged if you will arrange for me to have a very early interview with the Minister on the matter.

Those, I think, are all the material facts from Jones's affidavit.

The Minister of Supply has made an affidavit in which he says that he is:

> . . . His Majesty's Minister of Supply and a competent authority for the purposes of the Defence (General) Regulations, 1939, reg. 55.

He goes on to say:

> I have read the affidavit of the plaintiff company sworn herein on July 26, 1940, and in reply thereto I state that I carefully considered whether it was proper for me to exercise my powers under the Defence (General) Regulations, 1939, reg. 55 (4), in regard to the plaintiff company and reviewed all the relevant facts. It appeared to me that it was necessary in the interests of the defence of the realm and the efficient prosecution of the war to authorise the defendants to carry on the whole of the existing undertaking of the plaintiff company in accordance with my instructions and I therefore directed that the authority dated July 16, 1940, should be issued to the defendants.

Those are all the relevant facts for the purpose of determining whether or not, at this stage of the action, the plaintiff company are entitled to the injunction which they claim.

The first question is whether the regulation under which the Minister has acted is valid, and whether it is a regulation authorised to be made under the provisions of the Emergency Powers (Defence) Act, 1939, s. 1. By sect. 1, of that Act, it is provided as follows:

> (1) Subject to the provisions of this section, His Majesty may by Order in Council make such regulations (in this Act referred to as defence regulations) as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community. (2) Without prejudice to the generality of the powers conferred by the preceding subsection, defence regulations may, so far as appears to His Majesty in Council to be necessary or expedient for any of the purposes mentioned in that subsection. . . . (*b*) authorise—(i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking; (ii) the acquisition, on behalf of His Majesty, of any property other than land . . . (*d*) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification. . . . (4) A defence regulation, and any order, rule or byelaw duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Those, I think, are all the relevant parts of the Emergency Powers (Defence) Act, 1939, s. 1. In pursuance of the authority conferred by Parliament by the terms of the section which I have read, His Majesty in Council made the Defence (General) Regulations, 1939. Reg. 55 (4) of those regulations provides as follows:

> A competent authority, if it appears to that authority to be necessary so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of [the war], or for maintaining supplies and services essential to the life of the community, may carry on the whole or any part of any existing undertaking or authorise a person to carry on the whole or any part of any existing undertaking, in accordance with any instructions of the competent authority; and while by virtue of this paragraph a competent authority or a person so authorised is carrying on the whole or any part of an undertaking, (*a*) the said authority or person shall be deemed to be acting as the agent of the undertakers, except that the undertakers shall not have any right to control the carrying on of the undertaking or part of the undertaking; and (*b*) the undertakers shall not be bound, or, as the case may be, shall not in respect of such matters as may be specified by order of the competent authority, be bound, by any obligation or limitation imposed on the undertakers by or by virtue of any Act or other instrument determining their function.

Reg. 55 (5) provides that, amongst other persons, the Minister of Supply shall be deemed to be a competent authority, and reg. 55 (6) provides that the expression " undertaking " means any public utility undertaking or any undertaking by way of any trade or business, and that the expression " undertakers " shall be construed accordingly.

The first ground, as I have said, is that the making of that regulation is not authorised by the terms of the Act of Parliament, and, in my judgment, the regulation exceeds the authority which Parliament has conferred upon the rule-making authority. The authority is restricted to making regulations authorising

> . . . the taking of possession or control, on behalf of His Majesty, of any property or undertaking . . .

The regulation seems to me to go far beyond that authority. I can see in the Act of Parliament no authority given to the rule-making authority to authorise the carrying on, on behalf of the undertakers, of any undertaking which the rules authorise to be taken over on behalf of His Majesty. It seems to me that the consequences of holding that the rule relied upon is within the authority might have extraordinarily far-reaching effects. The person authorised to take control is deemed by the rule to be acting as the agent of the undertakers. However, if he chose to carry on his business, he would be making, not himself, but the undertakers, responsible for his acts. As far as I can see, there is no limit to the extent to which he could pledge the undertakers' credit, and no limit to the extent to which he could disregard the limits imposed by Parliament upon the powers of the undertaking, if it be a limited company, upon whose behalf he is authorised to act. I do not think that it is necessary for me to say anything more on the validity of the rule. For the reasons I have given, it seems to me that it goes beyond the authority which Parliament has conferred upon the rule-making authority, and it seems to me, therefore, to be invalid. As no other justification for the acts of the two persons named in the notice of motion is put forward, it seems to me that I ought to grant an injunction in the terms of the notice of motion.

There is only one more thing I wish to say, and that is upon whether or not, if one assumes that the regulation is valid, the reasonableness of the competent authority in acting under it can be questioned in a court of law. For the reasons which were stated by ATKIN, J., in *Lipton, Ltd.* v. *Ford* (1), at p. 654, it seems to me that, since the good faith of the competent authority is not in question, this court cannot inquire into that question, which, however, does not really arise in this case, in view of the opinion which I have previously expressed that the rule itself is *ultra vires*.

Injunction granted.

Solicitors: *W. R. J. Hickman & Randall* (for the plaintiffs); *Treasury Solicitor* (for the respondents).

[*Reported by* I. G. R. MOSES, *Barrister-at-Law.*]

R. *v.* INCOME TAX COMMISSIONERS, *Ex parte* GIBBS AND OTHERS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **July 8, 9, August 2, 1940.**]

Income Tax—Partnership—Admission of new partner—Assessment of profits—"Succession"—Continuance of business—Income Tax Act, 1918 (c. 40), *Sched. D, Cases I and II, rr.* 8, 9, 10, 11—*Finance Act,* 1926 (c. 22), *s.* 32.

The appellants were a firm of London stockbrokers. During the year of assessment, there had been a change in the firm through the taking in of a new partner on Feb. 7, 1938, and also a falling off of its profits far below its current assessment. The Revenue claimed to act upon a power conferred by Sched. D, Cases I and II, r. 9, to apportion the existing assessment between the parties of the year before and after the change, on the footing that one firm of 4 partners had "ceased to carry on the business" and had been "succeeded" by a new firm of 5 partners. The procedure laid down by the rule had been strictly followed, and, if the rule were applicable, the result claimed by the revenue—namely, that the existing assessment as apportioned became unalterably binding—would *prima facie* seem to follow. The firm contended that the rule had no application to such a change in the constitution of a partnership, and that it was limited to a case of one person really ceasing to carry on a business and another person succeeding to it. On Mar. 22, 1938, the firm of 5 partners agreed to take in a sixth partner as from Mar. 25, 1938. On Apr. 1, 1938, all the 6 partners sent a notice, in accordance with the proviso to r. 11 (1), requiring computation of the tax payable in accordance with that rule. No such notice had been sent in respect of the change on Feb. 7, 1938. The business was carried on after each of these dates in the same manner as before. The Revenue followed the procedure of Sched. D, Cases I and II, r. 9:—

HELD: rule 9 operates only where there is in a business sense a real ceasing and succession. It deals with a continuing business but with a total change of partners. Rules 10 and 11 deal with partnerships where a business is continued with a change in the constitution of the partnership and those rules were to be applied in this case.

[**EDITORIAL NOTE.** A distinction is here set up between a case where a number of partners make a small change in the partnership—such as the admission of a new partner, or the replacement of an existing partner by a new partner—and a case where a wholly new concern is created by the transfer of the business to quite a new partnership. The first case falls under rr. 10 and 11, and the second case falls under r. 9 of Cases I and II of Sched. D.

As to Successions in Partnerships, see HALSBURY, Hailsham Edn., Vol. 17, pp. 109-113, paras. 204-209; and for Cases, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214.]

Cases referred to

(1) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 20 Digest 197, *1*; 93 L.J.K.B. 390; 130 L.T. 164.

(2) *Faraday, Rodgers & Eller* v. *Carter* (1927), 11 Tax Cas. 565; Digest Supp.

Appeal by the taxpayers from an order of a Divisional Court (Hawke Charles and Hilbery, JJ.), dated May 10, 1940. The facts are fully set out in the judgment of Scott, L.J.

Cyril L. King, K.C., and *Frederick Grant* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

King, K.C.: The Income Tax Acts do not treat a partnership as a separate entity. A firm is no more an entity for the purposes of the Income Tax Acts than it is in the general law. The Divisional Court has held that the admission of a new partner amounts to a cessation of business by a firm of 4 partners and the establishment of a new business by the firm of 5 partners. There was nothing but the admission of a new partner. The question at issue is whether or not it can be said that the four partners ceased to carry on the trade and were succeeded by another " person." It is not correct to say that the facts of the present case constitute a succession. The admission of a fifth partner did not cause the partnership trade to cease for the purposes of the Income Tax Acts. The change which took place in Feb., 1938, had no effect at all. The revenue authorities take the view that the admission of the fifth partner on Feb. 7, 1938, is important for them, and they say that r. 9 applies. Rule 9 would apply if, for instance, a sole trader sold to a company a business that he had been carrying on. The rule is mandatory. On the facts of the present case, however, the 4 partners never ceased, within the year of assessment, to carry on the trade, nor were they succeeded in the year of assessment by another person. A partnership is not a " person." The first event which had any effect upon the assessment of income tax was the admission of the sixth partner in Mar., 1938. The taking in of the sixth partner did in fact bring into operation the proviso to the new r. 11. The consequence of the admission of the sixth partner would have been quite different if no notice had been given. The firm, however, exercised their right and gave a notice.

The Attorney-General: The only case in subrule (2) is where there is no continuance of any person in the new partnership. In law, there is a complete change of ownership where there is a change of partnership, although there is a common partner in the two successive partnerships. In this rule, it is plain that the legislature has used the word "succession" in reference to partnerships. In the year in which the tax is charged, A different people may be entitled to the income, and this rule says that the tax is to be assessed on, and paid by, the persons receiving and entitled to the income. It is charged, not on the persons who at the beginning of the year were running the business, but on the persons who are entitled to the income. That necessitates apportionment. In order to make B r. 1 effective, there have to be other rules. One finds the rule applied in r. 9. If a person ceases to be entitled to the income, there must be machinery by which he can get the tax transferred to the income of his successor. The whole basis of succession is the continuance of the trade. Under r. 11, the assessment is to be made as if there had been a C discontinuance of the trade and the setting up of a new trade. When one firm is destroyed and another takes its place, one taxable entity ceases to carry on trade, and the trade is thereafter carried on by another taxable entity. Therefore, the words used in r. 9 precisely cover that case. It is the succession of one taxable entity to another taxable entity, D whose identity has been destroyed. Rules 9 and 11 deal with different matters, and r. 11 does not exclude partnerships from r. 9: *Faraday, Rodgers & Eller* v. *Carter* (2). Where the identity of the old firm is destroyed and a completely new taxable entity takes its place, unless there are special reasons for holding the contrary, the firm whose identity E is destroyed ceases to carry on the trade, and the new taxable entity takes its place, even though there be a common partner. If the partnership is dissolved by all the partners retiring and new partners taking over, there is a succession. Any change in the partnership involves the destruction of the old firm. Rule 10 makes it quite clear that, when F there is any change in a partnership, it involves a new computation and assessment, irrespective of whether or not there are partners common to both the old and the new firms. There is a loss of identity of the old firm under the law, and there is a new taxable entity under r. 10. These cases are successions under r. 11. Rule 11 is a rule which should be G given the widest possible construction. It is directed to providing the machinery for carrying out an apportionment of income tax where the partners in one part of the year are different from those who carry on the trade in another portion of the year. The words in subrule (1) are meaningless unless they refer to a trade which is succeeded to from a H person who formerly carried it on. Rule 6 deals with deductions for wear and tear. The word "person" in r. 6 includes persons carrying on business in partnership. Rule 8, which has been repealed, is relevant for this purpose. Its terms applied to persons carrying on business in partnership. Rule 9 also so applies. The whole construction hangs together. Rule 9 should be given a wide construction, because it provides the machinery which may be applicable when there is an apportionment. The word "succeed" in the Finance (No. 2) Act, 1939, s. 16, is used in a way which supports my argument.

Hills: A partnership is a separate taxable group of persons. It is distinct from its partners. It is composed of its partners. That is ordinary partnership law, and it is adopted by r. 10. When one partner A
retires, no matter whether or not another comes in, there is a different partnership. It is unlikely that r. 9 would say that in England partnership can be divided, when it cannot be divided in Scotland. Rule 9 is no authority for saying that the word "person" cannot include a partnership. It can operate only in a case which falls within r. 11 (1). B
Otherwise it is meaningless.

SCOTT, L.J.: This appeal from an order of the Divisional Court refusing a prohibition raises an income-tax question between the Revenue and a firm of London stockbrokers. During the year of assessment, C
there had been a change in the firm through its taking in a new partner on Feb. 7, 1938, and also a falling off of its profits far below its current assessments under Sched. D. The Revenue claimed to act upon a power conferred by Sched. D., Cases I and II, r. 9, to apportion the existing assessment between the periods of the year before and after the change, D
on the footing that one firm had "ceased to carry on the business" and had been "succeeded" by a new firm. The procedure laid down by the rule had been strictly followed, and, if the rule were applicable, the result claimed by the Revenue—namely, that the existing assessment as apportioned became unalterably binding—would *prima facie* seem E
to follow. For reasons which I will state presently, I do not think that we need decide whether or not it would have followed to the extent of excluding all possibility of escape from the existing assessment. The firm contended that the rule had no application to such a change in the constitution of a partnership, and that it was limited to a case of one F
person really ceasing to carry on a business and another person succeeding to it. They pointed out that r. 10 and r. 11 are addressed to the rights and obligations of partnerships, and that, under the proviso to r. 11 (1), all the partners, both before and after a change, are given the express right by a notice signed by all of them to require the tax to be computed G
as if the trade had been discontinued at the date of the change and a new trade then commenced. This option was clearly granted by Parliament for the purpose of conferring an absolute right to require the Revenue to reduce the assessment based on the income of the previous period (then a 3-years' average) to the lower level of the actual income in the year H
of assessment. If the interpretation of r. 9 claimed by the Revenue and adopted by the Divisional Court were correct, it would be wholly inconsistent with the taxpayer's right of reduction under r. 11, for the procedure of r. 9 is mandatory. Under subrule (1), the inspector of taxes gives a certificate to the general commissioners of the division (in this

case the city of London) that one person has ceased to carry on the trade and another succeeded, and a certificate of the date and of the apportionment by time. Thereupon, under subrule (2), those commissioners are required to make a fair adjustment, charging the successor and relieving the person originally charged accordingly. By subrule (3), that determination is final and binding.

In the present case (but not till July 27, 1938), the inspector of taxes (who, by amending legislation, has taken the place of the surveyor under r. 9) issued his certificate, purporting to act under the rule, certifying the assessed profits of the firm at £69,355, the date of change as Feb. 7, 1938, and the apportioned amount of the assessment to be charged to the "successor" as £11,078. He gave four names of partners before the change, whom I shall call A, B, C, and D, with a fifth, E, after the change.

There is an earlier event necessary to complete the story. On Mar. 22, 1938, the firm of 5 agreed to take in a sixth partner as from Mar. 25. I call him F. There was also a "Stock Exchange partner," both before Feb. 7 and after Mar. 25, but he had no share in the firm's profits, and does not play any part in the story (except in the notice next to be mentioned), and I ignore him. On Apr. 1, in accordance with the proviso to r. 11 (1), all the partners (including F) sent a written notice to the surveyor of taxes requiring computation of the tax payable:

> . . . as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced . . .

It will be observed that the firm contented itself with a requisition in respect of the change on Mar. 25, and did not make any requisition in respect of the change on Feb. 7. The business was carried on after each of those dates as before. It was continued, and not discontinued. The procedure of r. 9 was duly followed by the Revenue. On Nov. 22, 1939, the clerk to the city commissioners notified the firm that on Feb. 6, 1940, the commissioners would meet to consider the inspector's certificate of July 27, 1939. The firm, considering that r. 9 did not apply to a mere change in a partnership where the business continued, but doubtless supposing that, if the commissioners acted upon the certificate, their "adjustment" might bind the firm finally to the old assessment, apportioned between the old and new firms, decided to move in the King's Bench Division for a prohibition to prevent the commissioners from so acting. The necessary "statement" under the new procedure (document 4) was filed in the King's Bench Division, with an affidavit sworn on Jan. 3, 1940, by the senior partner. It contains all the facts. The King's Bench Division dismissed the motion. The appeal is from that decision.

In my opinion, the motion should have been allowed. If the conditions precedent to the jurisdiction of the inspector to certify, and of the commissioners to adjust, imposed by r. 9 had not been fulfilled, neither authority had jurisdiction to act and, in view of the mandatory language of the rule and the express provision of subrule (3), I think that the present appellants were entitled to pray in aid the disciplinary control of the King's Bench, and were not driven to rely only on a possible but problematical defence to a subsequent claim of the Revenue to enforce tax liability on the basis of the old assessment. Prohibition lies as of right for any excess of jurisdiction by even a quasi-judicial tribunal (*R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), *per* Atkin, L.J., at pp. 204, 205), and the fact, if it were a fact, that some other provision of income tax legislation might possibly afford a defence would not give the Divisional Court a discretion to refuse the order.

Our decision depends directly on the interpretation of r. 9, but, if there be an ambiguity in that rule, then indirectly upon r. 10 and r. 11, with possible assistance from other provisions, past and present, which may throw light on r. 9. That rule was first introduced as the Taxes Management Act, 1880, s. 62. It appeared in Part IV of that Act, the title of which was "Assessment." Sect. 61 was entitled "Books of Assessment," sect. 62 "Changes," and sect. 63 "Omission from first assessments." It would appear, therefore, that sect. 62 was a machinery provision, and not a section either charging or releasing from charge. Its purpose was collection. A discretionary kind of release from liability on discontinuance of a trade and on a falling off of profits by deprivation of a source from a specific cause was already allowed by sect. 134 of the Act of 1842. A successor to a business was by that section required to pay on the existing assessment, but, if he could prove a falling off of its profits from a specific cause, he could get similar relief. These immunities and reliefs were made more definite in favour of the taxpayer by the Finance Act, 1907, s. 24 (2), (3), and in the 1918 Act those provisions became Sched. D, Cases I and II, r. 8 (1), (2)—the rule next preceding the crucial rule in this appeal. The next following rule, r. 10, provides for a statement by the senior partner of the profits of the business, and for a joint assessment in the partnership name. The use of the word "person," characteristic of r. 9, is dropped, and the new subject-matter is "partnership." Ordinarily, the subject-matter of r. 9 is the case of one proprietor of a business giving it up and another acquiring it as a going concern—for example, on a sale. The Interpretation Act, 1889, s. 19, of course applies to the word "person" in r. 9 "so far as the context permits." The context would obviously permit of its including the plural in case of one firm selling the business as a going concern to an individual or company, or to a wholly different firm, but I do not think that it is a natural use of language to say that a firm ceases to carry on its business and that another firm succeeds to the business when all that happens is, for instance, that a young managing clerk has become a very junior partner, with a tiny percentage of the firm's profits added to his salary. It is necessary to test the argument of the Attorney-General by such an extreme case, for his contention is necessarily one of law, and not one of fact. He says that such a change connotes a cesser and succession within the meaning of the rule. I cannot agree. If it be a question of fact, and the substance of that event is to be regarded, again I cannot agree. The commissioners have found against A him, and it cannot be said that there was no evidence to support that finding.

The natural construction of rr. 9, 10 and 11, read together, is that r. 9 operates only where there is in a business sense a real " ceasing " and " succeeding." It deals primarily with one person (natural or juridical) B as either " cesser " or " successor," and it extends to a plurality of such persons acting jointly only where there is a complete transfer from the one group to the other, or from a group to an individual, or *vice versa*. In such a case, a whole partnership ceasing or succeeding might come within r. 9, but otherwise r. 9 has nothing to do with partnerships. It C is rr. 10 and 11 which deal with partnerships, the function of r. 10 being only to introduce the machinery for assessing them. Thus viewed, those two rules naturally follow r. 9, and rr. 8 to 11 form a small self-contained group. Rule 8 deals with the complete discontinuance of an old business, and the setting up of a new. Rule 9 deals with a continuing business, D but with a total change of the person chargeable. Rule 11 also deals with a continuing business, but not with a total change in the personnel carrying it on (which has been disposed of by r. 9), but with the special case of a partnership where alone a partial change in the personnel chargeable can, and very frequently does, take place, and confers on the E persons chargeable a substantial benefit where the actual income has fallen below the assessed income, by deeming the change to be a discontinuance of the business within r. 8. Rule 11 in its present form was enacted by the Finance Act, 1926, s. 32, in place of the old rule as enacted in the Income Tax Act, 1918, which in its turn had in large measure F re-enacted Cases I and II, r. 4, under sect. 100 of the Act of 1842: DOWELL, 7th Edn., p. 296. The plain distinction between a change in a partnership, on the one hand, and a succession, on the other, appears perhaps even more clearly in the wording of the Acts of 1842 and 1918 than it does in the Act of 1926, although in the wording of the 1926 G Act also it is clear enough. As an aid to the interpretation of r. 9 in the 1918 Act, the more relevant version of r. 11 to consider is that which was enacted by Parliament in the same Act. The chief materiality of the 1926 version is that it seems to me tacitly to assume that the contrasted interpretations of rr. 9 and 11 in the 1918 Act which I have H expressed are correct, and the Finance Act, 1926, provides that its income-tax part is to be read as one with the 1918 Act. The old antithesis between an internal change in a partnership and an external succession to its business is maintained, and is emphasised in two ways. The separate and contrasted ideas are put into separate subsections, and the changing and changed partnership is given a new relief from tax in the shape of an option to all the partners, old and new together, to require that the Revenue shall apply the provisions of r. 8 *as if* there had been a discontinuance of the old business and a setting up of a new, the language of the option necessarily implying that in fact there has been no discontinuance. This right is obviously of great value to the taxpayer, in case the actual profits have fallen below the assessment. It is the very opposite of the provision of r. 9, which forbids any escape by the taxpayer from the existing assessment, and commands a mere apportionment of it. The old r. 11 was similar in its effect, though rather less beneficial to the taxpayer. The antithesis between taking a new partner into the partnership and ceasing to carry on the business and giving place to a successor is obviously fundamental, and appears to me of itself to show that the idea of succession is intended not to include a mere internal change in the personnel of a partnership.

Faraday, Rodgers & Eller v. *Carter* (2) was cited to us on behalf of the Revenue as a decision by Rowlatt, J., or at least an expression of opinion by him, that a change in a partnership constitutes a " succession " within r. 9. It cannot, in my view, be so regarded, and, if it can, I disagree with it. In that case, A and B dissolved partnership in Nov., 1922. A continued the old partnership business. In Dec., 1922, A took C into partnership. Those are the main facts of the case. However, one other question arose. B carried on a very small part of the old business in his private house for a short time, till after C's entry into the business. The general commissioners treated this continuation by B as negligible, and disregarded it, but held that A and C together had " succeeded " to A and B within the meaning of the old r. 11 of the Act of 1918, and the judge used the same word. The question at issue in the present appeal was never raised by the special case, nor was it argued before the judge, and whether the event was a change in the partnership or a succession was wholly immaterial to the application of the old rule. The use of the word " succession " was, in my opinion, simply a slip. The appeal must be allowed and the order for a prohibition made.

Clauson, L.J.: The judgment I am about to read is the judgment of Goddard, L.J., and myself. The sole point for the decision of this court may be formulated as follows. During the course of the year of assessment, a partnership of 4 persons carrying on the trade in respect of which the assessment is made takes in a fifth partner. It is suggested on behalf of the Revenue authorities that this circumstance makes it the right—and, indeed, the duty—of the appropriate officer to set in motion the machinery detailed in the Income Tax Act, 1918, Sched. D, Cases I and II, r. 9, and makes it the right—and, indeed, the duty—of the appropriate general commissioners to deal with the assessment by apportioning liability in respect of it between the original 4 partners on the one hand and the new partnership of 5 partners on the other.

On a perusal of r. 9, it becomes clear that the machinery for apportionment provided by the rule is to operate only if a person carrying on the trade in respect of which the assessment is made ceases within the year of assessment to carry it on and is succeeded therein by another person. The language seems to be wholly inappropriate to the present case. A The 4 original partners do not cease to carry on the trade. They continue to carry it on with the co-operation of a fifth person. That person in no sense succeeds to the trade. He joins in carrying on the trade. On the language of the rule, it appears to be wholly inapt to cover the case. The rule seems obviously framed to meet the wholly B different case where the business passes, whether on sale or on devolution on death, from one owner to another owner, and seems to be aimed at adjusting the claims of the Revenue against the two successive owners so as to throw the appropriate burden and liability on each.

Rule 9 is a re-enactment in 1918 of the Taxes Management Act, 1880, C s. 62. In 1880, the computation of duty arising in respect of a trade, in the case where there was a duality or plurality of ownership in the course of the year, was regulated by certain provisions which appear in the Income Tax Act, 1842, s. 100, as Sched. D, Cases I and II, rr. 3, 4. Rule 3 dealt with the method of assessing partners jointly upon a return D made by one of them. Rule 4, supplemented by sect. 134 of the Act of 1842, dealt with the case of a change in a partnership carrying on a trade within the period covered by the assessment of the trade so carried on, and also with the case of one person succeeding within that period of the business in respect of which the assessment was made. E The change or succession was not to affect the assessment, except on proof of a diminution of profits due to a specific alleged cause, but, on proof that the person charged had ceased during the period to carry on the trade, he might apply to the general commissioners for an amendment of the assessment, so as to give him such relief as should be just. If, however, F a person succeeded to the business of the party charged, the successor was to be liable to the full duties as assessed, without any new assessment, except on proof of a diminution of profits due to a specific cause. This statutory position was altered by the Taxes Management Act, 1880, s. 62, which is for all practical purposes in the same form as the present G r. 9. It seems reasonably clear that sect. 62 relates, and relates only, to the case where the person assessed ceases to carry on the concern (which is the word used in sect. 62) in respect of which the assessment is made and is succeeded therein by another person. In other words, the provision made by sect. 62 for setting up the machinery for apportioning the H assessment as between the person ceasing to carry on the business and the person succeeding him therein deals with the cases of succession dealt with in the latter part of the then r. 4, and has no concern with the cases of change in a partnership dealt with in the earlier part of r. 4.

The only method of construing either the present r. 9 or its predecessor, sect. 62 of the Act of 1880, so as to apply to such a case as the present is to treat the partnership consisting of the 4 original partners as one person and the partnership consisting of 5 partners as another person, and then to treat the 4 original partners (contrary to the obvious fact) as ceasing to carry on the business, and the new partnership consisting of the four original partners and the new partner (contrary to the obvious fact) as succeeding to the business. This, as we understand it, is the method of dealing with the matter adopted by the King's Bench Division in the judgment now under appeal, and is their justification for holding that r. 9 applies to the circumstances of the present case. We cannot see any reason for adopting such a highly artificial view, and, indeed, had the case been one to which the legislation, as it stood immediately after sect. 62 of the Act of 1842 had come into force, applied, we can scarcely think that any mind, however ingenious, would have made any such suggestion. The legislation as it stood after the Act of 1880 came into force was re-enacted with alterations of form in the Income Tax Act, 1918. Sect. 62 of the Act of 1880 was reproduced in r. 9, and the substance of Sched. D, Cases I and II, rr. 3, 4, in sect. 100 reproduced in rr. 10 and 11. Had r. 11 remained as it appeared in the Act of 1918, the same observations would apply, and we venture to think that the suggestion which the King's Bench Division adopted could hardly have been made. A radical alteration in the law was made, however, by the Finance Act, 1926, the purpose of which, as is well known, was to get rid of the old method of assessing business profits on an average of the preceding 3 years' profits, and to substitute an assessment by reference to the last preceding year's profits. As part of the change, r. 11, as it had stood up to that time, was repealed, and a new r. 11 was substituted, and it is from the terms of the new r. 11 that the suggestion derives any claims to plausibility which it possesses. We do not propose to recite the new rule at length. We can summarise its effect with sufficient accuracy for the present purpose as follows. The first sub-rule deals with a case where a change occurs in a partnership but one of the partners at least continues in the partnership. Such a change is not to affect the assessment, but, if all the persons concerned choose to ask for a reassessment to be made as if, at the moment of the change in the partnership, the trade had been discontinued and a new trade had been set up, such a reassessment is to be made. The second subrule deals with the case where a person succeeds to a business which until that time was carried on by another, and the case is not one to which subrule (1) applies, and it is enacted that the tax payable is to be computed as if the successor had set up a new business at the moment of succession, and as if the business theretofore carried on had been discontinued at the same moment. The paragraph goes on to provide that references in this subrule (2) to a person include references to a partnership.

The argument which found favour with the King's Bench Division was, as we understand it, as follows. It is said that the language of subrule (2) necessarily implies that a case to which subrule (1) applies—

that is, a case of change in the personnel of a partnership where one partner continues—is a case where one person succeeds to a business previously carried on by another person, and, therefore, necessarily implies that a change in the constitution of a partnership is regarded by the legislature as a case where there is a succession in regard to the trade between one person or group of persons (for the singular includes the plural), consisting of the original 4 partners, on the one hand, and another person or group of persons, consisting of the 4 original partners plus the new partner on the other, and accordingly r. 9 applies to this succession, and the condition is fulfilled which brings r. 9 into operation. We doubt whether it is legitimate to use the new r. 11 as altering the meaning of r. 9, for that is really what the argument involves. However, waiving this point, we are quite unable to read the words in subrule (2) "and the case is not one to which subrule (1) of this rule applies" as amounting to a positive enactment that, although a change in a partnership which carries on a business where one partner continues after the change is not in fact, and has never been, treated in income-tax legislation as being a discontinuance of a business by the old partners and a succession to that business by the old partners and the new partner, such a change is hereafter to be deemed to be such a discontinuance and succession. The words are merely inserted, in our view, *ex majore cautela* to make it clear that subrule (2) has nothing to do with the cases to which subrule (1) applies.

Some reliance seems also to have been placed upon the words which enact that in subrule (2) references to a person include references to a partnership, but that, in our view, is obviously directed to making it clear that, where one partnership transfers a business to another person, either an individual or a partnership which consists of persons entirely different from those which constitute the transferring partnership, this subrule will operate. In other words, it is a reminder that, as the singular includes the plural, the word "person" includes several persons in partnership. The subrule has already made it clear that the case where the business is carried on by a firm in which there is one partner, who was also in the firm which therefore carried it on, is wholly outside this subrule.

We must mention a further argument which found favour with the King's Bench Division, and which we find ourselves unable to accept. It was said that, unless r. 9 is construed so as to enable the assessment to be apportioned under its provisions in such a case as the present, where the parties do not avail themselves of their power to get a re-assessment under the proviso to subrule (1), there is a *casus omissus.* We do not follow this argument. It is to be borne in mind that until 1880 there was no such provision as r. 9 in existence, and those concerned, whether in the case of a change of partners or in the case of a transfer of the business from one owner to another, had to do without any such provision. In 1880, it was found desirable to set up this machinery so as to adjust the rights between the Revenue and the successive owners of a transferred business. No machinery, as we read the Act, was set up to deal with the case of a change of partners, for the continuing partners would remain liable to the Revenue (as, indeed, we imagine, would the retiring partners in respect of the current year), and the adjustment of the burden as between continuing and incoming partners would obviously in practice be a matter to be dealt with by the partners themselves, in accordance with their mutual partnership obligations. We are not impressed by the argument of *casus omissus*, when the need to deal with the case was not apparent either from 1842 to 1880 or from 1880 until r. 11 was altered in 1926, or, indeed, so far as we are aware, until this present litigation was started.

One final argument was that, unless r. 9 is construed as the Revenue contend, there seems now to be no case to which r. 9 applies, and it is asked why r. 9 was not then repealed. That seems to us a very poor ground for giving an entirely unnatural meaning to reasonably plain words. It may be that the uselessness of r. 9 after the legislation of 1926 was overlooked, or it may be that the draftsman of the Act (as, indeed, the words already mentioned, which refer in r. 11 (2) to subrule (1), suggest) may have misapprehended the meaning of r. 9. In any case, the fact that a provision which has become inoperative in practice is left unrepealed does not appear to us to assist in the construction of it. For these reasons, we find ourselves unable to agree with the judgment of the King's Bench Division. In our judgment, the condition precedent to the operation of r. 9—namely, that a person has ceased to carry on a business and has been succeeded therein by another person—is not fulfilled by the circumstances of the case. It follows that the officer of the Revenue had no duty or right to give the certificate under r. 9 (1) and the general commissioners have no duty or right to adjust the assessment under r. 9 (2). The appeal should, in our judgment, be allowed, and the order of prohibition asked for in the notice of motion should be made.

Appeal allowed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Janson, Cobb, Pearson & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

FULHAM BOROUGH COUNCIL *v.* A. B. HEMMINGS, LTD.

[KING'S BENCH DIVISION (Humphreys, Atkinson and Croom-Johnson, JJ.), **July 31, 1940.]**

Factories and Shops—Basement bakehouse—Notice revoking certificate of suitability—Appeal against notice—Premises rendered suitable before decision by court of summary jurisdiction—" Is suitable "—Factories Act, 1937 (*c.* 67), *ss.* 53 (3), 54 (2), (3).

On May 12, 1939, the appellant council served upon the respondents, who owned a small underground bakehouse in respect of which a certificate of suitability had been issued, a notice under the Factories Act, 1937, s. 54 (2), that the certificate should cease to have effect after the expiration of 6 months on account of, *inter alia,* inadequate ventilation. The respondents appealed under subsect. (3), which allows the court, " if it is satisfied that the bakehouse is suitable as regards " ventilation, to direct that the certificate shall continue to operate. It was found by the magistrate as a fact that, up to a date between June 23, 1939, and July 20, 1939, the ventilation was inadequate and unsuitable. However, between those dates, during an adjournment of the hearing of the appeal, the respondents spent £600 in improving the ventilation of the premises by installing an electrical air-conditioning apparatus, and thereafter the ventilation was in all respects satisfactory. The appellants contended that alterations made after the commencement of the hearing of the appeal should be disregarded and the question considered as at the date of the notice, but the magistrate considered that, by reason of the express words of subsect. (3), he was justified in taking into consideration the state of the premises at the time when he had to consider whether or not they were suitable and accordingly directed that the certificate should continue to operate. The council appealed from this determination :—

HELD : the magistrate had taken the correct view by reason of the wording of subsect. (3). The words " is suitable " must be construed in accordance with their plain grammatical meaning, and it is, therefore, for the court to decide at the time when it is determining the matter, whether or not it is satisfied that the premises are suitable.

[EDITORIAL NOTE. Cases usually fall to be decided according to the state of facts existing at the commencement of the proceedings. It is here held, however, that, upon the proper construction of the section, the material time is the date at which the matter is determined by the court.

AS TO UNDERGROUND BAKEHOUSES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 588, 589, para. 1123 ; and FOR CASES, see DIGEST, Vol. 24, pp. 906, 907, Nos. 57-61.]

Cases referred to :

(1) *Marriott* v. *Minister of Health,* [1937] 1 K.B. 128 ; [1936] 2 All E.R. 865 ; Digest Supp. ; 106 L.J.K.B. 149 ; 155 L.T. 94.

(2) *R.* v. *Montagu* (1884), 49 J.P. 55 ; 33 Digest 424, *1372.*

CASE STATED by a metropolitan magistrate under the Factories Act, 1937, s. 54, for the decision of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment of HUMPHREYS, J.

John W. Morris, K.C., and *G. Granville Sharp* for the appellants.

N. J. Laski, K.C., and *H. J. Astell Burt* for the respondents.

HUMPHREYS, J. : This is a case stated by a metropolitan magistrate upon a point which arose in the course of the hearing by him of an appeal under the Factories Act, 1937, s. 54, which deals with basement bakehouses. The case deals with a number of matters. It sets out a number of matters upon which evidence was given, and expresses the view of the magistrate upon those matters. Many of them—indeed, all except one matter—are unnecessary, in my opinion, for the decision on the point which alone has been raised by the case, and which has been argued before us. I think that the material parts of the case may be said to be these. Sect. 54, since it is necessary to deal with it in order to apprehend the point, is one which commences by providing that a basement bakehouse shall not be used as a bakehouse unless it was so used at the date of the passing of the Act. That is a mere re-statement of the law as it had been ever since 1901. There is nothing new in it, because, by the Factory and Workshop Act, 1901, s. 101, it is provided that an underground bakehouse shall not be used as a bakehouse unless it was so used at the passing of that Act. Sect. 54 goes on to provide that, not only must the bakehouse have been used at the date of the passing of this Act, but also a certificate of suitability must have been issued by the district council under the Factory and Workshop Act, 1901. Sect. 54 (2) provides as follows:

> It shall be the duty of every district council to carry out, in the year beginning at the date of the commencement of this Act and in every fifth succeeding year after that year, an examination of every basement bakehouse in respect of which a certificate of suitability has been issued and (*a*) if as the result of the examination the council are not satisfied that the bakehouse is suitable for use as such as regards construction, height, light, ventilation, and any hygienic respect, they shall give notice in writing that the certificate shall cease to have effect after the expiration of such period, being not less than one month, as may be specified in the notice, and the basement bakehouse shall not be used as a bakehouse after the expiration of that period; or (*b*) if the council are satisfied that the bakehouse is suitable . . . they shall give notice in writing that the certificate shall continue to operate . . .

What happened in this case was that this bakehouse—actually there were two bakehouses, but the same facts apply to both—had been used as such for a considerable period, and under certificates of suitability. Notices under the section were duly given by the Fulham Borough Council, the appellants in this matter, to the respondents, the owners of the premises, on May 12, 1939, and the notices, it has been drawn to our attention quite correctly, give the owner of the bakehouse a period of 6 months instead of a shorter period, the time of one month being prescribed as the shortest period. The case goes on to state that the matters in respect of which the appellants upon examination—there was an examination on the part of the appellants—made complaint in relation to the premises were the ventilation, the lighting, and the facilities for cleaning. The case goes on to deal with the complaints in regard to the lighting and the facilities for the cleaning of this underground basement bakehouse. The magistrate came to the conclusion that there was no satisfactory evidence to justify the council in refusing the certificates on either of those two grounds. The third matter was the ventilation, and in regard to the ventilation the magistrate finds as a fact in para. 5 (*o*) of the case that up to a date between June 23, 1939, and

July 20, 1939, the ventilation of the premises was inadequate and unsuitable according to the standard set up by the appellants, which the magistrate accepted as being a reasonable standard. It seems to be clear, therefore, that, in the view of the magistrate, upon his findings of fact, the notices which were served on the part of the appellant council were justified in fact and in law.

I return for a moment to sect. 54. It is provided in subsect. (3) as follows:

> Where the district council give notice that a certificate of a basement bakehouse is to cease to have effect, the occupier may, within 21 days of the notice, appeal by way of complaint to a court of summary jurisdiction, and the court may, if it is satisfied that the bakehouse is suitable as regards the matters aforesaid, by order direct that the certificate shall continue to operate as if a notice had been given under para. (*b*) of the last foregoing subsection . . .

That is to say, the court may order that the certificate shall continue to operate as if the council had been satisfied that the bakehouse was suitable. In this case the occupiers of the bakehouse, the respondents to this case, gave such a notice of appeal, and the appeal came before the magistrate, who has stated this case. Para. 5 (*r*) of the case states as follows:

> . . . the method of ventilation of the said two bakehouses at the time of the service of the notices . . . was a method which was in existence at the time of the grant of the certificates . . . such method was that usually employed in small underground bakehouses but . . . the method of ventilation did not comply with the higher standard of ventilation which is now being required by the appellants . . . between June 23, 1939, and July 20, 1939, during an adjournment of the hearing of the appeal the respondents by an expenditure of £600 improved the ventilation of the said premises by the installation therein of electrical air-conditioning apparatus . . . after the installation of the said apparatus the ventilation of the said premises was in all respects satisfactory.

Upon that evidence, and in view of those findings, certain contentions were made by the parties. The contention on the part of the appellants was that the magistrate ought to pay no attention to the facts that, as between the date when he first became seised of this matter by reason of the appeal being brought before him and the date when he had to give his judgment, alterations had been made, and that that which had been unsuitable at the date of the notices was now suitable for use as an underground bakehouse, by reason of the alterations. Whether or not that contention is correct is, I think, the only question raised in this case, and it is necessary to examine it. The magistrate, in a long opinion in which he has set out his views, came to this conclusion:

> From a consideration . . . of the expressed wording of the section, and fortified by [a] decision of the Court of Appeal [he was justified in taking into consideration the state of the premises at the time when he had to declare whether or not, in his view, they were suitable].

In particular, he relied upon these words in subsect. (3):

> . . . the court [the appeal court] may, if it is satisfied that the bakehouse is suitable as regards the matters aforesaid, by order direct that the certificate shall continue . . .

In my view, the magistrate was correct in the opinion at which he arrived, and which he expressed. The appeal which is referred to in subsect. (3) is not, in my view, an appeal brought merely in order to decide the question of whether or not some act done in the past was correctly done. It is perfectly true that, upon the appeal, it is open to the appellant before that tribunal, before the magistrate, to say that the notices were bad for some reason or other, and that, therefore, he is entitled to succeed. No doubt it is relevant to the matter to consider A the state of the premises at the time when the notices were given, and I have already said that, in my opinion, the findings of the magistrate show that the notices were properly given, and were justified by the state of the premises at that time. In my view, however, that is not the whole duty of the magistrate under this section. As counsel for the B respondents quite correctly argued, I think, it is not like an appeal against a conviction, in which the only question before the court is whether the person did commit an offence in the past at the time and place alleged against him. This is a case, I think, much more analogous to the case where an appeal court has to decide the question on such a C matter as whether an order to abate a nuisance by some public authority is one which he must uphold or which he ought to alter, and it would surprise me very much to be told that in such a case a court is confined to the consideration of the question whether or not at the time when the notice to abate the nuisance was served, there was a nuisance, if D there is evidence before the court, in spite of that fact, that at the moment there is no nuisance existing. It would certainly surprise me to be told that in such a case the law of this country would require that the court should declare that there was a nuisance existing and order the abatement of that nuisance when the court was of opinion that there was E no nuisance existing at all.

I think that the duty of the magistrate under this section is very much the same, because the word is " is," as has been pointed out so often. The magistrate is to be satisfied that the bakehouse is—not was at the time when the notice was given, but is—suitable as regards the F matters aforesaid. I think that the magistrate, for those reasons, which I have endeavoured to put quite shortly, was justified in taking the view which he did. Indeed, in my view, his own view of the law was the correct view, by reason of the reading of that appeal section, or subsection, without reference to any other matter at all. G

We have been referred to one or two other matters. Our attention has been called to sect. 53 of the Act, and it is said that that is a section, as it certainly is, which, dealing with underground rooms, provides in terms for enabling an occupier who is using an underground room which for some reason or other is unsuitable, to make alterations and H make the room suitable for occupation although it is an underground room. That is perfectly true, but then one observes that in that case there is also a right of appeal, though in terms very different from those employed in sect. 54. The appeal is given in sect. 53 (3) in these terms:

> If the occupier is aggrieved by any decision of an inspector [not of a court, but

> of an inspector who has examined the room regarded as unsuitable] . . . he may, within 21 days of the date of issue of the certificate . . . appeal . . . to a court of summary jurisdiction . . .

That is all. Therefore, in that case, it may well be that the only question which the court has to consider is whether it is right to say that the underground room is or was suitable for occupation as an underground room, having regard to the fact that the inspector is bound to suspend the operation for such period as he considers necessary to enable the occupier to render the room suitable. That seems to me a very different matter from the appeal which is provided for in sect. 54 (3).

We have also been referred to the Housing Act, 1936, in which there is a more or less similar provision dealing with totally different matters, and, for my own part, I do not derive any assistance from a consideration of that, nor, I think, does *Marriott* v. *Minister of Health* (1), referred to in the case, really assist the court to arrive at a decision in this case. That, again, was a different class of matter, arising under a different statute. *R.* v. *Montagu* (2) is perhaps a little nearer to this case. That was a case in which the court had to consider the position of a licensed house which had certain privileges attaching to it, one of the privileges being that the renewal of the annual licence could not be refused except upon certain grounds, one of which was that the premises were not qualified by law. That meant, in those days, that the premises were not of a sufficient ratable value, in regard to most licensed houses, and there were other qualifications required. The question arose there as to the position in a case where, at the date when the matter originally arose and opposition was offered to the renewal of the certificate, the premises were not qualified by law, but where, in between that date and the date when the matter became ripe for the decision of the local court, the premises had become qualified. The decision of the court in that case was that the court were bound to pay attention to the question as it arose, and to deal with the facts as they found them at the time when they had to declare what the position was, and that a court which had said that, because the premises were not qualified some little time back, therefore the licence was properly taken away, was taking a wrong view of the law, and ought to have asked, and to have confined their attention to dealing with the question, "What is the position to-day? Is this a house which is not qualified by law, or is it a house which is qualified by law to receive the certificate?" Finding that, no matter when it had happened, in point of fact the house was qualified, they ought to have renewed the certificate. That may be of some little assistance. However, in my opinion, the matter really falls to be decided upon what I regard as the somewhat plain language of the section itself. On that language, I think that the magistrate was right in the conclusion at which he arrived. I think that he properly applied his mind to the law, as he expresses it, and that, therefore, this appeal should be dismissed.

Atkinson, J.: I agree. Humphreys, J., has indicated the circumstances in which there arises the question whether, in construing the Factories Act, 1937, s. 54 (3), the court is to construe the words "is suitable" as meaning "was suitable at some earlier date." It seems to me that, *prima facie*, one has to construe the language in its plain, grammatical meaning unless there is some good reason to the contrary. If one departs from the grammatical meaning in this case, one finds oneself in a world of inconsistencies and injustices. There are three earlier dates indicated. First, there is the date of the examination by somebody qualified to examine—a medical officer of health or an inspector who makes a report. Obviously the council comes to its determination upon the report of its adviser. Then there is the date upon which the council determines that it is not satisfied that the bakehouse is suitable for use. Thirdly, there is the date of the serving of the notice. To which date has the court of summary jurisdiction to go? Is the court to consider whether the report was well founded, or is it to go to the date when the council came to its determination, or to the date of the notice? The respondents say the date of the notice, but where does that lead one? If the inspector indicates to the owner "I do not like this ventilation and I am afraid that I shall have to report adversely upon it," and promptly the owner gets the matter dealt with and has the ventilation put right, and the council, not knowing that anything has been done, comes to its determination that the premises are unsuitable, and serves a notice, on the contention of the respondents here, the appeal should succeed, because, at the date of the notice, the premises were suitable. If, however, the inspector does not indicate at all what he thinks is wrong, or, indeed, being anxious to see these basement bakeries closed, indicates that he has nothing to complain of, and the owner, believing that things are all right, does nothing, and is served with a notice, it seems to me that a gross injustice would be done. If the inspector has given some indication of what is wrong, and the man has had an opportunity of putting it right, and has put it right, he is protected under the section, but the man who has had no indication given to him, and has had no opportunity of making good the deficiency, is to be closed down. There is no suggestion in this case that the man was in any way at fault. The insufficiency was due, not to any neglect on the owner's part, but to the raising of the standard required by the council. It would seem very hard, and a very strange result, if a council could quietly raise its standard with regard to some requirement and then serve a notice upon an owner, if from that moment onwards the owner were to have no opportunity of making his premises in accordance with the requirement. I think that these are relevant considerations, because it may be that a court can be asked to construe words in other than their plain grammatical meaning if some other reading of the words would lead to a more reasonable construction, but, to my mind, once we depart here from the grammatical meaning we get most unreasonable results. It must be remembered that every bakehouse to which this section can apply must have been in existence before 1901, and must have been certified as suitable by the council. That is under sect. 101 (4) of the Act of 1901, which provides as follows :

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> An underground bakehouse shall not be certified as suitable unless the district council is satisfied that it is suitable as regards construction, light, ventilation and in all other respects.

Thus, the section is dealing with bakehouses which in fact have been certified by the council as suitable, and it would seem to me a most B unreasonable construction at which to arrive to say : " What the legislature really meant was that an owner of premises which have been certified as suitable, and which the owner had every reason to believe were suitable, and which have become unsuitable only because the council, without any publication of its change of view, has raised its C standard, should be debarred by the service of a notice from any opportunity of bringing his premises up-to-date." I cannot think that we should attribute to Parliament the desire to close down enterprises of long standing. I think that the intention which we ought to attribute to Parliament is rather a wish for enterprises to be continued so long as D they are continued under hygienic conditions. Therefore, in my opinion, the only way in which these words can be properly construed is in accordance with their plain grammatical meaning, and any other interpretation or construction would lead one to results which cannot have been intended by Parliament. There would be one result if the inspector E opened his mouth and another if he kept his mouth closed. I agree that the appeal should be dismissed.

CROOM-JOHNSON, J. : I agree, and for the same reasons. Were it not for the fact that counsel for the appellants has informed us that at F least one other mind has taken a different view of this matter, I should have been content to say no more. As it is, I think it desirable that I should add one or two words of my own with reference to the proper construction of sect. 54.

We are dealing here with bakehouses described as underground, G which must have been in existence before the passing of the Factory and Workshop Act, 1901, on Aug. 17, 1901. Under sect. 101 of that Act of Parliament, an underground bakehouse is not to be used as a bakehouse unless it was so used at the passing of that Act, and, subject to that provision, there is an arrangement laid down in that section H under which certificates that the underground bakehouse is suitable for the purposes of being used as such may be granted by the district council. In that Act of Parliament, and in subsect. (7) of that section, there appeared a right of the occupier of the bakehouse, in a case of a refusal of a certificate by the district council, to apply to a court of summary jurisdiction by way of complaint against that refusal, and, if it appeared to the satisfaction of the court that in fact the bakehouse was suitable for use as regards construction and so on, it was provided that the court should thereupon grant a certificate as to the suitability of the bakehouse which should have effect as if granted by the district council. It is interesting to observe that that is very nearly 40 years ago, and we have not been referred to any case in which it was suggested that the words "is suitable" in that section had any other meaning than the plain meaning which is to be attributed to tolerably plain language.

In 1937, the section, so far as the Act of 1901 was concerned, was repealed, and the legislation is now to be found in the Factories Act, 1937, s. 54, which starts off as follows:

> (1) Without prejudice to the provisions of the last foregoing section, a basement bakehouse shall not be used as a bakehouse unless it was so used at the date of the passing of this Act and a certificate of suitability had been issued by the district council under an enactment repealed by this Act . . .

That obviously refers to the Act of 1901. The modern section then goes on to make it the duty of every district council to carry out in the year beginning at the date of the commencement of the 1937 Act, which was July 1, 1938, an inspection, and, in every fifth succeeding year after that year, an inspection—or examination, to use more accurate language—of every basement bakehouse in respect of which a certificate of suitability has been issued. Therefore, it is a re-examination of places which up to that time have been lawfully used, and in which a lawful enterprise has been carried on, because, notwithstanding the prohibition in the Act of 1901, they have received a certificate of suitability.

The Act then goes on to point out that, if, as a result of the examination, the council are not satisfied that the bakehouse is suitable, then they may serve a notice (which is what was done in this case) on the occupier of the bakehouse giving him notice, which must be not less than a month's notice, that the certificate will cease to have effect. The next matter is that, under subsect. (2) (*b*), if the council are satisfied that the bakehouse is suitable, they are then under an obligation to give notice in writing that the certificate shall continue to operate so long as the bakehouse may otherwise lawfully be used, but without prejudice to the power of the council to revoke the certificate as the result of a subsequent examination under the subsection. I presume, without deciding it, that that is a reference to the quinquennial period under which they are empowered—and, indeed, directed—to make their subsequent examinations. Thereupon follows the subsection which has to be construed in this case, and that is a subsection which applies in cases where the district council have given notice under subsect. (2) (*a*) of their intention to cease to grant the certificate of suitability on some future date. That empowers the occupier within 21 days of the notice to appeal by way of complaint to a court of summary jurisdiction.

The question arises on these words in sect. 54 (3):

> . . . and the court may, if it is satisfied that the bakehouse is suitable [do certain things].

One of the things which it may do is by order to direct that the certificate shall continue to operate as if a notice had been given under para. (*b*). Para. (*b*) deals with the notice which is to be given by the district council in a case where it is satisfied. *Ex hypothesi*, this district council never has been satisfied, and, therefore, it is obvious, to my mind, that, when the court, under subsect. (3), is going to put itself into the position of examining whether or not it can direct an order on the basis of subsect. (2) (*b*), inasmuch as nobody has been satisfied up to that time, it is for the court to determine then and there, at the time when it is determining the matter, whether or not it is satisfied. I add that because it seems to me that it strengthens the plain meaning of the language which is used in the subsection—namely, "is satisfied"—and it seems to me that, as ATKINSON, J., has pointed out, any other view of this case would involve both the court and the parties in all sorts of difficulties. It is true—and I mention it merely to show that I have not overlooked it—that subsect. (3) goes on to say that, as an alternative, the court may, by order extend the period at the expiration of which the certificate is to cease to have effect, but that does not seem to me to detract from the force of the point which I have indicated, and which appeals to me as a plain indication of the intention of the legislature to substitute a determination, a "satisfaction" (if that be the right word), by the court of summary jurisdiction before whom the matter comes for the want of satisfaction by the district council against which the complaint by way of appeal has been launched by the aggrieved occupier. I think that, in construing language of this sort, one must bear in mind that this is a case in which, as I have indicated already, people are carrying out a perfectly reputable business permitted by the council to be carried out under a certificate which must have been in existence since 1901, and, in these circumstances, as what is sought to be done is to deprive the occupier of his right so to carry on his business, we ought to construe this language strictly. I do not think that it is really necessary to construe it because, as I see the case, the language is so plain that it is not really susceptible to very much doubt. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Wilfred Townend*, Town Clerk, Fulham (for the appellants); *Sturton & Sturton* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Applied. Mint *v.* Good. [1950] 2 All E.R. 1159.

HEAP *v.* IND COOPE & ALLSOPP, LTD.

[Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Tucker, J.), **July 4, 1940.**]

Landlord and Tenant—Repair—Want of—Liability for accident—No covenant by landlord to repair—Permission to enter and repair—Repairs previously carried out by landlord—Knowledge of landlord.

The plaintiff was injured through the want of repair of a cellar flap of certain public-house premises. The public-house was a tied house. The freeholders were the L. Brewery Co., Ltd., who had leased it to the defendants. The defendants had sublet the premises, subject to a tie, to the licensee. The defendants in the lease to them from the L. Brewery Co., Ltd., had covenanted to repair the premises, but in the sublease from them to the licensee they had not covenanted to repair, but had reserved the right to enter and view the premises, and had in fact from time to time repaired the premises. The defendants contended that, in these circumstances, the liability in damages to the plaintiff in respect of his injury was upon the occupier, the licensee. There was no evidence that the defendants knew of the want of repair :—

Held : the mesne landlords were liable in damages to the plaintiff, and were liable whether or not they knew of the want of repair.

[**EDITORIAL NOTE.** In this case the court has followed the recent decision in *Wringe* v. *Cohen* (3). The circumstances of this case were the subject of conflicting decisions, and the judgment herein makes it clear that *Wringe* v. *Cohen* (3) is now the leading authority on this matter.

As to Liability of Landlord, see HALSBURY, Hailsham Edn., Vol. 20, pp. 206, 207, para. 225 ; and for Cases, see DIGEST, Vol. 31, pp. 344-346, Nos. 4871-4891.]

Cases referred to :

(1) *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264 ; Digest, Practice, 407, *1077* ; 76 L.J.K.B. 127 ; 95 L.T. 905.

(2) *Wilchick* v. *Marks & Silverstone*, [1934] 2 K.B. 56 ; Digest Supp. ; 103 L.J.K.B. 372 ; 151 L.T. 60.

(3) *Wringe* v. *Cohen*, [1940] 1 K.B. 229 ; [1939] 4 All E.R. 241 ; Digest Supp. ; 109 L.J.K.B. 227 ; 161 L.T. 366.

Appeal by the defendants from a judgment of His Honour Judge A. C. Caporn given at the Walsall County Court on May 20, 1940. The facts are fully set out in the judgment of MacKinnon, L.J. The county court judge founded his judgment upon *Wringe* v. *Cohen* (3), in which the Court of Appeal held that a landlord who has undertaken to perform repairs must indemnify a member of the public injured through lack of necessary repairs while that member of the public is exercising his rights on a highway. He found that the defendants had undertaken to perform the repairs and that the failure to execute them had caused the plaintiff's injuries, and gave judgment against them for £500 with costs. The defendants appealed.

D. M. Rosenberg for the appellants.

W. Longley James for the respondent.

MacKinnon, L.J. : This is an appeal from a judgment of His Honour Judge A. C. Caporn in the Walsall County Court. On Apr. 4, 1938, the plaintiff, Heap, who keeps a shop in Walsall, was going to a public-house known as the Victoria House. As he approached it, he had to cross over the cellar flap. It had glass lights in it, and, as he stepped on it, it gave way beneath him, so that he fell into the cellar and sustained serious injuries. It is perfectly obvious, in those circumstances, that he had a claim against somebody. He went to a firm of solicitors to act for him in the matter, and the county court judge eventually assessed the compensation at £500.

The public-house was a tied house. The brewer landlords were Ind Coope & Allsopp, Ltd. The tenant was one Poxon. The solicitors wrote first of all to Ind Coope & Allsopp, Ltd., making a claim on behalf of Heap. Their application to that company was answered by the Licensees and General Insurance Co., Ltd., who said, in effect: "You are making a claim on the wrong people. The landlords are not liable. You ought to claim on the tenant." A short time afterwards, the solicitors did write to the tenant, and make a claim on him. Thereupon, the firm of solicitors representing the tenant wrote back and said: "You are claiming on the wrong man. You ought not to claim on us. You ought to claim on the landlords, Ind Coope & Allsopp, Ltd., and, if you issue a writ against us, we shall bring them in as third parties." In those circumstances, I am a little surprised that Heap's solicitors did not sue both of them, because, when each of them was saying that he was not liable but that the other was, it is quite clear that he would be safe in his ultimate claim for costs, under the principle of *Bullock* v. *London General Omnibus Co.* (1). However, after considering the matter, having in mind, I suppose, the fact that Ind Coope & Allsopp, Ltd., were perhaps more opulent than Poxon, the solicitors eventually pressed their claim against Ind Coope & Allsopp, Ltd. The solicitors then appeared on behalf of the insurance company, and they raised another point. They said: "In any case, we are not liable, because we are not the freeholders. We are only tenants under a lease from the freeholders, who are the Lichfield Brewery Co., Ltd." That added another possible third defendant. Eventually the writ in this action in the King's Bench Division was issued against Ind Coope & Allsopp, Ltd., the tied-house brewers. The case was remitted to the county court at Walsall. The position was that the Victoria House was the freehold property of the Lichfield Brewery Co., Ltd. That is a legal distinction, although in fact it has very little substance in it, because all the shares in the Lichfield Brewery Co., Ltd., are held by the defendants. There was a lease between the Lichfield Brewery Co., Ltd., and Ind Coope & Allsopp, Ltd., and under that lease, Ind Coope & Allsopp, Ltd., covenanted with the Lichfield Brewery Co., Ltd., that they would from time to time and at all times keep the premises in a good and tenantable state of repair and condition. Having become tenants of the house under that lease, dated June 21, 1935, from the Lichfield Brewery Co., Ltd., Ind Coope & Allsopp, Ltd., granted a lease to Poxon on Aug. 1, 1935. Under that lease, the covenants as to repair were these. Poxon undertook to keep the interior of the premises in repair, but he undertook no obligation as regards the exterior of the premises, and no obligation greater than that of internal decoration. There was no covenant by the landlords that they would keep the premises externally in repair, or structurally in repair, but it was part of the lessee's covenants that he would permit the agents of the landlords, or any person authorised by them, to enter upon the premises at any time and at all reasonable times for the purpose of viewing the state of the premises, and, at the tenant's own expense, make good all defects and want of reparations therein—those, of course, being such defects and want of reparations as by his previous covenant he had undertaken to remedy. The evidence was that in fact Ind Coope & Allsopp, Ltd., having that liberty to come upon the premises and repair them, have from time to time carried out all necessary repairs. Indeed, some time previously they had executed some small repairs to this cellar flap. When a glass section of it had been broken, they had had it repaired by putting in a wooden substitute.

Those being the terms under which the defendants were tenants from the Lichfield Brewery Co., Ltd., and under which Poxon was tenant from them, the question arises whether the plaintiff (who, as I have said previously, obviously ought to recover his damages from somebody) has made a technical mistake in suing Ind Coope & Allsopp, Ltd., instead of Poxon. It is argued by counsel for the appellants that he has done so, and that, although he had an irrefragable claim against Poxon, he is technically wrong, because he has made that claim against Ind Coope & Allsopp, Ltd. Our attention has been called to a number of cases. Counsel for the appellants says that in such a case as this *prima facie* the occupier is liable, but his landlord may be liable, as counsel for the appellants says, in only one event—namely, if the landlord has covenanted to do the repairs the lack of which has caused the damage to the plaintiff. He says that the latter rule is based upon a rule with reference to circuity of action, because, if the occupier were made liable, he in his turn would have a claim over against the landlord for breach of his covenant to repair, and, therefore, an injured person can sue the landlord direct, and that, inasmuch as there is no covenant to repair by Ind Coope & Allsopp, Ltd., as towards Poxon in this case, that rule does not apply, and Heap has made a mistake and sued the wrong party.

There are other cases, in some of which some members of this court have been previously concerned, and some discussion as to how far those decisions go and the nature of their precise effect is no doubt possible. As far as I am concerned, I freely avow that, inasmuch as in common sense and in all decency Heap ought to be able to recover against somebody, and, in the circumstances of this case, and having regard to the correspondence which has taken place, in all common sense and decency he is able to recover against these defendants if the law allows it, my only concern is to see whether, upon the cases, the law does allow him so to recover. I think that it does. It was held by Goddard, J., in *Wilchick* v. *Marks & Silverstone* (2) that, where a third party had been injured by the lack of repair of a house, and the landlords had not covenanted to do the repairs but had reserved a right to enter and do the repairs if they thought fit, that was sufficient to give the damaged third party a direct right of action against the landlord, and it did not merely limit him to a right against the occupier. Goddard, J., added to that suggested rule of liability a proviso that it could arise only in a case where the landlord knew, or had notice, of the defect or lack of repair in the property in question. That qualification or condition that the landlord must know that repairs are wanted, or that the defect is existing, has, I think, been said to be incorrect in *Wringe* v. *Cohen* (3). If that qualification is taken away, then the decision of Goddard, J., otherwise, I think, approved in this court, seems to me to cover the position of Ind Coope & Allsopp, Ltd., in the present case. Goddard, J., said, at p. 67 :

> If I use a highway the duty I am under not to injure other persons is not special or contractual, but general, arising from what Lord Esher used to call proximity. A property owner knows that his house if not repaired must at some time get into a dangerous state : he lets it to a tenant and puts him under no obligation to keep it repaired : it may be the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs : why then should he be under no duty to make it safe for passers by when he knows that the property is dangerous ? The proximity is there : he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant ?

In view of the later expression of opinion in *Wringe* v. *Cohen* (3), that case has to be read omitting the words which I read : " when he knows that the property is dangerous." If one omits those words, that statement of Goddard, J., exactly covers the position in this case. " The landlord has expressly reserved to himself the right to enter and do necessary repairs : why then should he be under no duty to make it safe for passers by [like Heap] ? The proximity is there : he had the right to enter and remedy a known danger. Is the injured person to be left in such a case with a remedy only against the tenant ? " Upon those grounds, I think that the law as it stands does permit me to give effect to my sense of ordinary justice and common sense and to say that this decision of the county court judge was correct, and that the judgment against the defendants should stand.

Luxmoore, L.J. : I agree.

Tucker, J. : I agree.

Appeal dismissed with costs.

Solicitors : *S. Rutter & Co.* (for the appellants) ; *Peacock & Goddard*, agents for *Ernest W. Haden & Stretton*, Walsall (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re S. BROWN & SON (GENERAL WAREHOUSEMEN), LTD.

[Chancery Division (Bennett, J.), **July 30, 1940.]**

Emergency Legislation—Company—Debenture—Appointment of joint receivers and managers—Subsequent voluntary liquidation of company—Application for leave to sell—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2).

The respondent company executed two debentures, under which power was given, after the principal moneys had become payable, to appoint a receiver with power of sale, the receiver to be deemed for all purposes the agent of the company. The debentureholders, with leave of the court under the Courts (Emergency Powers) Act, 1939, appointed joint receivers and managers. Subsequently the company went into liquidation, which, in accordance with *Gosling* v. *Gaskell* (1), put an end to the agency of the receivers *quoad* the company. Thereafter, the receivers applied under sect. 1 (2) for leave to sell the property comprised in the debentures :—

Held : the application for leave of the court must be made by the debentureholders, whose agents the receiver must be assumed to be, as from the date of the liquidation.

[EDITORIAL NOTE. When a receiver is appointed under a document which provides that he shall be the agent of the company, his agency *quoad* the company terminates on the company going into liquidation for the reason that the company no longer exists except for purposes of winding up. If, thereafter, he wishes to exercise a power of sale, he is doing so at the instance of the debenture-holders who appointed him, and must therefore first apply for leave under the Courts (Emergency Powers) Act, 1939, s. 1 (2).

As to Position of Receiver of Company in Liquidation, see HALSBURY, Hailsham Edn., Vol. 5, pp. 515, 516, para. 835; and for Cases, see DIGEST, Vol. 10, pp. 792, 793, Nos. 4974-4980.]

Case referred to :

(1) *Gosling* v. *Gaskell*, [1897] A.C. 575 ; 10 Digest 792, *4975* ; 66 L.J.Q.B. 848 ; 77 L.T. 314 ; *revsg.*, [1896] 1 Q.B. 669.

Procedure Summons for leave under the Courts (Emergency Powers) Act, 1939, to sell property comprised in two debentures. The property was owned by S. Brown & Son (General Warehousemen), Ltd., and both debentures were dated Nov. 1, 1937. The debentureholders appointed C. Sherrott and W. H. Cork receivers and managers under the powers contained in cl. 11 of the debentures, leave of the court being obtained on Feb. 27, 1940. The receivers and managers issued a summons on June 12, 1940, for leave under the Act to sell, but, on the company going into liquidation, the debentureholders Solomon Brown and Mrs. Sarah Brown were added as applicants under the summons on July 23, 1940.

M. L. Gedge for the applicants.

Bennett, J. : This is a summons under the Courts (Emergency Powers) Act, 1939, asking for leave that the receivers and managers, C. Sherrott and W. H. Cork, should be allowed to sell the property comprised in the debentures. Clause 11 of the debentures provides for the appointment of a receiver under hand after the principal moneys become payable :

. . . with power for such receiver, in addition to exercising the powers conferred by

> the sections of the Law of Property Act, 1925, hereinafter mentioned, to manage and carry on the business of the company, to take possession of, get in and collect the property and assets hereby charged, and to sell, convert into money and realise the same . . . any receiver so appointed shall so far as the law allows be deemed to be the agent of the company for all purposes.

Since the order of Feb. 27, 1940, giving leave to appoint a receiver was A made, the company has gone into voluntary liquidation, and, according to *Gosling* v. *Gaskell* (1), the result of that is to terminate the agency between the receivers and managers on the one hand, and the company on the other. The question now arises, therefore, whether the receivers and managers when they wish to sell, should obtain the leave of the B court under the Courts (Emergency Powers) Act, 1939. The answer to that question depends upon the meaning of sect. 1 (2) of the Act, having regard to the particular facts of the case. Sect. 1 (2) provides as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court:—(*a*) to proceed to exercise any remedy which is available to him by way of . . . (iv) the realisation of any security or C the forfeiture of any deposit . . .

In the present case, if the company had not gone into liquidation, and if the receivers and managers still remained the agents of the company, it might have been difficult to say that the receivers and managers acting as the company's agents and seeking to exercise the powers con- D tained in cl. 11 of the debentures, were proceeding to exercise any remedy available to the debentureholders within the meaning of the Act. In the present case, however, the position is entirely different. As the result of the liquidation, the receivers and managers have ceased to be the agents of the company, and are acting in co-operation with the E debentureholders by whom they were appointed. If the receivers desire to realise the property, in these circumstances, they would be acting as agents of the debentureholders, and their act in realising it would be, not their act, but that of the debentureholders. In such circumstances it would be necessary for leave of the court to be obtained at the instance F of the debentureholders, whose agents the receivers and managers must be presumed to be. That is my view of the meaning of the Courts (Emergency Powers) Act, 1939, on the facts before me. There is no difficulty in making the order, and I give the applicants authority to sell the property comprised in the debentures.

G I will express no view as to the position where a receiver has been appointed under hand, has had powers of sale given him, and has been made the agent of the debenture-holders, and such agency has not been determined, by the voluntary liquidation of the company or otherwise, as it was in this case.

H *Leave to sell granted to the applicants.*

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the applicants).

[*Reported by* I. G. R. MOSES, *Barrister-at-Law.*]

BELL PROPERTY TRUST, LTD. *v.* HAMPSTEAD BOROUGH ASSESSMENT COMMITTEE.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **July 18, 19, 22, August 8, 1940.**]

Rates and Rating—Flats—Provision of services and amenities by landlord—Ascertainment of gross rateable value—Valuation (Metropolis) Act, 1869 (*c.* 67), *s.* 4.

The owners of a block of flats let them to tenants at rents including payment for services and amenities provided by them and also for the use by the tenants of common parts of the building which the owners maintained. The owners claimed to deduct from the gross rents the cost of the services and amenities provided. They claimed in particular to deduct (*a*) £534 in respect of the cost of repairing and maintaining the passages, stairways, lifts, staff-rooms and ornamental grounds; (*b*) £763 in respect of depreciation of plant, machinery, boilers, refrigerators, wirelesses and of the portions of the building used to house such installations; (*c*) £530 in respect of managing and supervising the services provided; (*d*) £310 in respect of unproductive expenditure on services by reason of vacant flats; (*e*) £932, being 25 per cent. of the annual cost of the services, by way of profit; (*f*) £783 by way of interest upon the capital cost of plant and machinery and portions of the building used for the provision of the services; and (*g*) that the deduction in respect of rates should take into account the possibility of an increase in rates. On this appeal the claim to deduct items (*f*) and (*g*) was abandoned by the owners:—

Held: (i) the cost of providing the services and amenities and a sum representing the profits thereon would properly be deductible from the gross rents for the purpose of determining the gross rateable value.

(ii) items (*a*) to (*e*) above were proper deductions.

Pullen v. *St. Saviour's Union* (2) *overruled.*

[EDITORIAL NOTE. In assessing the rateable value of property let furnished, it has always been the rule to deduct from the gross rent the part charged in respect of the use of the furniture. In *Pullen* v. *St. Saviour's Union* (2), an addition to the rent for defraying the cost of cleaning and lighting the common staircase was included in the computation of the gross rateable value. From this it was argued that no deduction could be made from the gross rental value in respect of the services now commonly supplied in the case of modern blocks of flats. This view was adopted by the Divisional Court, since they considered themselves bound by *Pullen* v. *St. Saviour's Union* (2). The Court of Appeal, who were not bound by that decision, have held, in common with the view stated in textbooks and with the view which the Divisional Court would have taken had they not been bound by the previous decision, that deductions in respect of the cost of the services given may be made from the gross rental value.

As to Rateable Value and Services Supplied to Tenant, see HALSBURY, Hailsham Edn., Vol. 27, pp. 388, 389, para. 821; and for Cases, see DIGEST, Vol. 38, pp. 519, 520, Nos. 697, 698.]

Cases referred to:

(1) *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382; 31 Digest 422, *5681*.

(2) *Pullen* v. *St. Saviour's Union*, [1900] 1 Q.B. 138; 38 Digest 519, *697*; 69 L.J.Q.B. 139; 81 L.T. 583.

(3) *R.* v. *Lee* (1866), L.R. 1 Q.B. 241; 38 Digest 553, *934*; 35 L.J.M.C. 105; 13 L.T. 704.

(4) *M'Ewan* v. *Glasgow Assessor*, [1937] S.C. 511.

(5) *Poplar Metropolitan Borough Assessment Committee* v. *Roberts*, [1922] 2 A.C. 93; 38 Digest 520, *698*; 91 L.J.K.B. 449; 127 L.T. 99; *revsg.* S.C. *sub nom. Roberts* v. *Poplar Assessment Committee*, [1922] 1 K.B. 25.

(6) *White Brothers* v. *South Stoneham Assessment Committee*, [1915] 1 K.B. 103; 38 Digest 529, *753*; 84 L.J.K.B. 273; 112 L.T. 154.

(7) *R.* v. *Adames* (1832), 4 B. & Ad. 61; 38 Digest 526, *736*; 2 L.J.M.C. 90.

(8) *R.* v. *Vange (Inhabitants)* (1842), 3 Q.B. 242; 38 Digest 527, *738*; 11 L.J.M.C. 117.

(9) *R.* v. *Gainsborough Union* (1871), L.R. 7 Q.B. 64; 38 Digest 527, *740*; 41 L.J.M.C. 1; *sub nom. Gainsborough Union* v. *Welch*, 25 L.T. 589.

(10) *Green* v. *Newport Union, Stead* v. *Newport Union*, [1909] A.C. 35; 38 Digest 527, *739*; 78 L.J.K.B. 97; 99 L.T. 893; *revsg.* S.C. *sub nom. Newport Union* v. *Stead, Newport Union* v. *Green*, [1907] 2 K.B. 460.

(11) *R.* v. *Smith* (1885), 55 L.J.M.C. 49; 25 Digest 54, *479*; 54 L.T. 431.

(12) *Waddle* v. *Sunderland Union*, [1908] 1 K.B. 642; 38 Digest 565, *1031*; 77 L.J.K.B. 509; 98 L.T. 260; *affg.*, [1906] 2 K.B. 899.

(13) *Appenrodt* v. *Central Middlesex Assessment Committee*, [1937] 2 K.B. 48; [1937] 2 All E.R. 325; Digest Supp.; 106 L.J.K.B. 690; 157 L.T. 201.

(14) *Nan Will* v. *Glasgow Assessor*, [1937] S.C. 518.

(15) *Gateshead Assessment Committee* v. *Redheugh Colliery, Ltd.*, [1925] A.C. 309; 38 Digest 604, *1309*; 94 L.J.K.B. 258; 132 L.T. 583; *affg.*, [1924] 1 K.B. 369.

(16) *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)*, [1938] A.C. 321; Digest Supp.; 158 L.T. 498; *sub nom. Robinson Bros. (Brewers), Ltd.* v. *Houghton & Chester-le-Street Assessment Committee*, [1938] 2 All E.R. 79; 107 L.J.K.B. 369.

APPEAL by the property owners from an order of the Divisional Court (CHARLES, HUMPHREYS and ASQUITH, JJ.), dated May 29, 1940, allowing the appeal of the assessment committee from an order of quarter sessions. The County of London Quarter Sessions stated a special case upon an appeal by the Bell Property Trust, Ltd., from the assessment of a block of 123 flats known as Eton Rise. The flats were self-contained, and the tenants were entitled under their agreements to certain services, such as the supply of heating and hot water and the use of passages, stairways, lifts, staff-rooms and ornamental grounds. The owners of the flats claimed the following deductions from the gross rents of the flats in order to ascertain the gross rateable value:

(*a*) £534 in respect of the cost of repairing and maintaining the passages, stairways, lifts, staff-rooms and ornamental grounds;

(*b*) £763 in respect of depreciation of plant, machinery, boilers, refrigerators, wirelesses and of the portions of the building used to house such installations;

(*c*) £530 in respect of managing and supervising the services provided;

(*d*) £310 in respect of unproductive expenditure on services by reason of vacant flats; and

(*e*) £932, being 25 per cent. of the annual cost of the services, by way of profit.

The owners also claimed £783 by way of interest upon the capital cost of plant and machinery and the portions of the building used for the provision of the services, and claimed that the deduction in respect of rates should take into account the possibility of an increase in the rates.

Quarter sessions allowed the deductions (*a*) to (*e*), but not the other two claims. Upon appeal to the Divisional Court, that decision was reversed, the court holding itself bound by *Pullen* v. *St. Saviour's Union* (2). The owners appealed to the Court of Appeal.

Sydney G. Turner, K.C., *G. R. Blanco White, K.C.*, and *B. E. Dutton Briant* (for *Paul Springman* on war service) for the appellants.

A. S. Comyns Carr, K.C., and *Michael E. Rowe* for the respondents.

Turner, K.C.: Quarter sessions applied the right principle of law. *Pullen* v. *St. Saviour's Union* (2) is distinguishable from the present case. In the alternative, *Pullen's* case (2) was not properly decided. The enhancement of the rent is not to be measured by the cost to the landlord of providing and maintaining the amenities. *Pullen's* case (2) is distinguishable from the present case on its facts. It would be straining *Pullen's* case (2) to say that, whatever the amenities provided by the landlord of a modern block of flats, the cost of the whole of the amenities must be included in the gross value of the flats. If *Pullen's* case (2) would cover the present case, it was wrongly decided. If the hereditament overlooks Hyde Park, a tenant is willing to pay more for it, but the hereditament is not rated higher on the basis of what it costs to maintain Hyde Park. If, in the present case, the services were provided by a contractor, he would want a profit and the fact that they are provided by the landlord can make no difference in principle. [Counsel referred to *M'Ewan* v. *Glasgow Assessor* (4) and *Nan Will* v. *Glasgow Assessor* (14).]

Blanco White, K.C.: The first point to be decided is how far *Pullen* v. *St. Saviour's Union* (2) was properly decided, and how far it applies in the present case. It was said in *Poplar Metropolitan Borough Assessment Committee* v. *Roberts* (5) that what has to be determined is not the value to the landlord but the value to the tenant. *Pullen* v. *St. Saviour's Union* (2) is based upon a fallacy. In arriving at the gross value, one has to assume that the landlord has to bear the expenses necessary to maintain the hereditament in a condition to command the rent. In the present case, there are 123 flats, each of which is a separate hereditament. There is also one which is in the occupation, not of the tenants, but of the landlord. That is the common staircase. No tenant would take a flat unless the staircase was kept clean and lighted. It is not one of the expenses necessary to maintain the hereditament in a state to command the rent, however, because the duty might be undertaken by the tenants. In *Pullen* v. *St. Saviour's Union* (2), it was assumed that the staircase was part of the hereditament. It is not part of the hereditament. It is something in the occupation of the landlord, but the tenants have a right to use it. In *Pullen's* case (2), the expense was treated as an expense necessary to maintain the hereditament in a state to command the rent. In so far as the Court of Appeal is concerned, the question is at large. *Pullen* v. *St. Saviour's Union* (2) has been doubted in every book on rating. [Counsel referred to Ryde on Rating, 7th Edn., p. 232, Ryde on Rating, 6th Edn., p. 198, and to *White Brothers* v. *South Stoneham Assessment Committee* (6).]

Comyns Carr, K.C.: The gross value ought to be the adjusted rents. That does not mean that the appellants should be disallowed these deductions altogether. If, however, the deductions are to be allowed, they should be allowed as deductions from gross to rateable. That means that the appellants must show that it is necessary for them to incur the expense in order to maintain the hereditament in a state to command the rent. The appellants could not get the profit on services allowed on a reduction from gross to rateable value. They should not get it in any event. There is abundant authority for the proposition that it does not matter whether the expenses are incurred upon or off the hereditament. There is the further question as to whether the expenses are confined to expenses *ejusdem generis* with repairs and insurance, so far as anything could be defined by reference to these two words, or whether they may include expenses of any kind. They may include any expenses, provided that they are necessary to maintain the hereditament in a state to command the rent. This court is entitled to overrule *Pullen* v. *St. Saviour's Union* (2), if it thinks proper. The kind of expense incurred outside the hereditament necessary to maintain the hereditament in a state to command the rent is shown by *R.* v. *Adames* (7), *R.* v. *Vange (Inhabitants)* (8) and *R.* v. *Gainsborough Union* (9). The relevance of these cases is that, if a farm were taken undrained, it would be worth less than it would be worth if drained. Therefore, a sum is deducted to obtain the difference between gross and rateable value. The landlord has to pay for the maintenance of works off the hereditament for the benefit of that hereditament and others. In the present case, the appellants maintain and operate boilers in order that hot water can be supplied to the flats. The cases cited lay down a principle very different from that suggested on behalf of the appellants. *R.* v. *Gainsborough Union* (9) is analogous to the present case. The maintenance of a boiler is analogous to the maintenance of drainage works, in that in each case something is done off the hereditament to produce a result on the hereditament. *Stead* v. *Newport Union* (10) dealt with a point similar to that in *R.* v. *Vange (Inhabitants)* (8). These cases show that expenses to maintain the hereditament may be incurred otherwise than upon the hereditament itself. Consequently, they include, not only actual repairs, but also the operation of a system of protection. Statutory charges must not be deducted before arriving at gross value. It must be assumed that the landlord is going to do the work and that the tenant is going to pay for it. *R.* v. *Smith* (11) shows that any services rendered which make the hereditament more valuable than it would otherwise be are expenses within the meaning of the Act. *White Brothers* v. *South Stoneham Assessment Committee* (6) is definitely wrong, and is in conflict with the whole of the authorities. So far from *Pullen* v. *St. Saviour's Union* (2) being wrong, the earlier cases go much further than *Pullen's* case (2) does. *Pullen's* case (2) is perfectly right, and should be adopted by the court, subject to the fact that Parliament by the proviso to the Rating and Valuation Act, 1925, s. 68, has excluded its operation outside London. The authority of *Pullen's* case (2) is recognised by inference in the proviso to sect. 68 of the 1925 Act. Outside London, there is a scale applicable to flats. There is no scale, however, in London. It was therefore necessary to exclude *Pullen's* case (2), so far as the provinces are concerned, and that was done by the proviso to sect. 68. The landlord owns one unified business—namely, that of letting flats with certain amenities. He cannot be regarded as letting the flats as a landlord and providing the amenities as a contractor. [Counsel referred to *Waddle* v. *Sunderland Union* (12), *Appenrodt* v. *Central Middlesex Assessment Committee* (13), *Nan Will* v. *Glasgow Assessor* (14), *M'Ewan* v. *Glasgow Assessor* (4) and *Gateshead Assessment Committee* v. *Redheugh Colliery, Ltd.* (15).]

Turner, K.C., in reply, referred to *Robinson Bros.* (*Brewers*), *Ltd.* v. *Durham County Assessment Committee* (*Area No. 7*) (16).

GODDARD, L.J. [delivering the judgment of the court]: The appeal related solely to the gross value of the hereditaments—that is to say, the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditament (in this case any one of the individual flats, as each must be assessed separately), if the tenant undertook to pay all usual tenant's rates and taxes, and if the landlord undertook to bear the cost of repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent: Valuation (Metropolis) Act, 1869, s. 4. The question is how the gross value is to be ascertained.

The difficulty, if difficulty there be, is one which is familiar to everyone of experience in rating law. The definition is in substance taken from the Parochial Assessment Act, 1836, which in turn gave statutory authority to the method of valuation which had been generally adopted for many years before that Act was passed. When rateable hereditaments consisted only of houses, mills, shops, farms, and such like properties, the ascertainment of annual value was comparatively simple, but changing conditions in industrial and social life brought about many complications, and to apply this definition to railways, sewers, gasworks, and other public utility undertakings was difficult in the extreme. In spite of appeals from the courts, Parliament, however, gave no assistance by clarifying the position by legislation. It preserved the definition in further Acts, such as the one which we are now considering, the Union Assessment Committee Act, 1862, and, indeed, in the recent Act of 1925, which, while effecting many great and fundamental changes in rating practice and law, left this matter unaltered. Accordingly, the ingenuity of rating surveyors was directed to devising various methods and formulæ whereby a notional annual value could be attributed to rateable properties which in fact could have no annual value in the ordinary sense, and, as the courts gave their approval to these methods, which from their nature could only be highly artificial, so they took their place in the law of rating. Thus was evolved, to take only two instances, the contractors' theory, as it is called, and also the profits basis, for public utility corporations with property in more than one parish.

The development of flats as a normal class of dwelling both in London and in the provinces brought other problems, and that with which we are now concerned arises from the fact that modern flat-dwellers expect, and owners vie with each other in providing, a variety of services and amenities unknown to an earlier generation. Whereas the provision of a lift and the attendance of a porter in uniform may have been all the service which was usually furnished by a flat-owner 30 years ago, constant domestic hot water, central heating, a tastefully laid-out garden, radio programmes relayed to each flat from a station in the building, and perhaps a swimming-pool are nowadays among the attractions which may be, and often are, offered to a prospective tenant. In some cases which have come before the courts, usually in connection with service flats, separate agreements, stipulating for separate payments, are made with regard to certain of these amenities, and in others, as in the present case, the tenant pays a gross sum, which includes the rent and the privilege of enjoying the services and amenities provided.

In the present case, the owner, having compounded, was rated, and the question in issue in respect of each flat was at what figure it should be assessed. While it does not follow that the actual rent paid by a tenant is the legal measure of the rent which the hypothetical tenant would pay, no question of this sort arises here, as the surveyors on each side evidently considered that the actual rents reserved were what a hypothetical tenant would be willing to pay, and the questions raised by the special case turn entirely on the issue as to what portion of the gross sums payable by the tenants was actually for rents and what portion was a remuneration for services, or consideration for services and amenities, provided for the tenants by the landlord.

We have already pointed out that the methods to be applied for valuing classes of hereditaments which were unknown at the time of the Act of 1836, are for the most part the result of theories applied by rating surveyors, which in whole or in part have received the sanction of the courts as best calculated to arrive at a fair result compatible with the statutory definition. We lay some emphasis on this point, because it appears in the present case that the experienced surveyors who represented the respective parties seem to have agreed in principle that the proper method was to find out the value of the services and amenities offered and to deduct that value from the gross sum which the tenant pays, leaving the balance to represent the true value of the flat. We have no doubt that, in so doing, they were adopting a method generally applied by their profession, and, be it observed, the assessment committee was also content that this method should be applied. As Lord Ellenborough said in *Isherwood* v. *Oldknow* (1), at p. 396:

> *Communis opinio* is evidence of what the law is.

The difference which arose was not as to method, but as to particular items claimed by one side but resisted by the other as legitimate deductions before arriving at the gross value. However, when this appeal came before the quarter sessions, counsel for the respondents submitted that none of the items could be deducted to ascertain the gross value, but could be deducted, if at all, only as:

> . . . other expenses necessary to maintain the hereditament in a state to command that rent.

He contended that this followed from the decision in *Pullen* v. *St. Saviour's Union* (2). The quarter sessions did not give effect to this contention, possibly because they thought the case distinguishable, but they stated the present case, and the Divisional Court, on this point being taken before them, held that they were bound by the decision. This meant that the gross rental had been ascertained on wholly wrong principles, and, accordingly, they allowed the appeal, and restored the valuation of the assessment committee. As there was no cross-appeal, it seems to follow that that was all they could do, although in fact the assessment committee had applied a method which the court felt constrained to hold was wrong. From the judgments, it appears that the court followed *Pullen's* case (2) with reluctance, and expressed doubt as to whether it was rightly decided, and the first question we have to determine is whether the judgment is right or should be overruled.

It is to be observed that *Pullen's* case (2) has never been followed, and authors of works on this branch of the law have expressed doubts as to its correctness. Charles, J., in the court below, said that it appeared to be contrary to what he had always believed to be the law, and we must see exactly what the court in that case decided. The facts were that working-class tenements were let to tenants at rents of 8*s*. 6*d*. to 10*s*. per week. Each tenant, on taking a tenement, was told that he would have to pay 6*d*. per week to the landlord's collector, in addition to the rent, and out of these sixpences the collector arranged for the cleaning and the lighting of the staircase. Quarter sessions held that the 6*d*. ought to be regarded as part of the rent, and the court upheld them. In our opinion, the decision was wrong, and the law is correctly stated in the argument for the appellant, which is clearly and concisely set out in the report. A tenant, knowing that he would have to pay this levy of 6*d*. per week, would take that into account when considering what rent he could afford to pay, and we can see no ground for holding that the 6*d*. was part of the rent, and not payment for services. We think that this case should be overruled.

We therefore approach the present case unfettered by the decision in *Pullen's* case (2). Here we have a gross sum paid by the tenant, not only for the occupation of the flat, but also for the various services and amenities provided. We can see no difference in principle between such a case as this and that of the letting of a furnished flat. In the latter case, the law is well-settled that one must ascertain how much is paid in respect of the furniture and the things in no way forming part of the rateable premises, such as rates, which are usually paid by a landlord who lets furnished, and the remainder represents the rent of the house itself, for which it is rateable : *R.* v. *Lee* (3). To exactly the same effect is the opinion of LORD FLEMING in *M'Ewan* v. *Glasgow Assessor* (4), where the question for decision was much the same as that in the present case. LORD FLEMING said, at p. 514 :

> . . . the yearly rent or value of a flat or apartment was the proportion of the gross rent paid to the owner which could fairly be attributed to the occupation of the heritable subject.

Having then pointed out that the gross rent, by which he means the actual sum paid by the tenant, includes various services, he continues as follows, at p. 514 :

> . . . the tenants periodically pay a lump sum for the personal services and for the use of the heritable subject, and the problem, accordingly, is to ascertain the proportion of the *cumulo* payment which effeirs to the heritable subject.

From these cases, with which we entirely agree, it appears that not only the rating surveyors and the assessment committee, but also quarter sessions, approached the problem correctly. They set out to find what proportion of the sums reserved by the leases as rent represented the value of the services and amenities provided by the lessors, and, when they deducted that and the rates, the balance left represented the true gross value. The hypothetical tenant, of course, is not concerned with what it costs the landlord to provide these services. He considers only what he can afford to pay for the sum of what he gets—namely, a flat to live in, together with such services and other attractions as may be offered. A man who feels he can pay a rent of about £250, and has been paying that in an old-fashioned flat with open fireplaces, where the water has to be heated in the kitchen, may well feel that he can pay, say, £275 or £300 for one in which he will be provided with domestic hot water and central heating. He will not concern himself with what it costs the landlord to provide those services, but it is none the less true that what he pays for the use of the flat itself is the rent reserved less a proper remuneration to the landlord for providing him with hot water in his taps and in his radiators. The question before quarter sessions, therefore, was essentially one of fact, and it is not for this court to interfere with their findings on amount, provided that they have directed their minds to the proper question, unless, indeed, they have taken into account some matter or expense which they ought not to have done. Counsel for the respondents challenged in particular two sums which quarter sessions allowed by way of deduction. The first was the sum of £932 representing profit on the annual payment for services. Quarter sessions allowed this deduction, on the ground that the landlords would not provide these services and amenities for the bare cost, but would want a return on their outlay. That seems very reasonable, and was one of the items allowed by the Court of Session in *M'Ewan* v. *Glasgow Assessor* (4). In any case, it is one of the matters which the court had to take into account in asking themselves how much of the gross sum received by the landlords and paid by the tenants represented payment for the actual occupation of the flat. We see no ground for saying that they were not entitled to allow a sum for profit in considering what was a proper remuneration to the owner, and the amount was entirely a matter for quarter sessions. The other sum challenged was £534, which represents the cost of repairs to what counsel for the respondents called the common parts—for instance, repairs to the approach roads and decoration of stairs and passages. The objection taken to these being allowed was that, as deductions for repairs had to be allowed to ascertain the rateable value, it meant that the rateable occupiers—namely, the appellants—would be getting the deduction twice over. That is not so. To ascertain the rateable value, a deduction of 34·3 per cent. from the gross value has been made, and no complaint is now made as to this. As the costs of these repairs were deducted in arriving at the gross value, they form no part of the sum on which this percentage has been taken, so they have not been deducted twice, and we think that they are matters which quarter sessions might properly take into account in ascertaining the true gross rental.

In their notice of appeal the appellants sought to challenge the decision of quarter sessions in refusing to allow the amount claimed by them as interest on installations, and also in deducting rates at only 12*s.* 8*d.* in the £ instead of at 13*s.*, but counsel for the appellants abandoned both these claims before us, and there is no need, therefore, to deal with them. The appeal is allowed, and the decision of the court of quarter sessions is confirmed.

Appeal allowed.

Solicitors: *Simmons & Simmons* (for the appellants); *P. H. Harrold*, Town Clerk, Hampstead (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

CLEADON TRUST, LTD. *v.* DAVIS.

[Court of Appeal (Scott, Clauson and Luxmoore, L.JJ.), **July 25, 1940.**]

Sale of Land—Title—Defect—Vendors to obtain release of restrictive covenant against building—Local authority passing town planning resolution whereby land to be left as open space—Whether condition still binding on vendors.

A contract, dated Sept. 24, 1937, for the purchase of a plot of land was conditional upon the vendors obtaining a licence varying certain restrictions of user of the property to enable the purchaser to erect a block of flats thereon. The contract gave the purchaser an option to purchase a further piece of land on the terms and conditions of the contract, so far as applicable thereto. The purchaser exercised the option by a letter dated Sept. 20, 1938, and the vendors then contended that cl. 5 of the original contract relating to modification of the restriction as to user was not applicable, since on May 24, 1938, the local district council had passed a resolution under the Town and Country Planning Act, 1932, s. 6, under which the land subject to the option to purchase was to be retained unbuilt on as an open space. No inquiry had been held in respect of the planning scheme, which had not become effective. The purchaser's solicitors required the vendors to obtain, and to hand over on completion, a deed of release of the restrictive covenant, but the vendors replied that the purchaser must make his own arrangements with the borough surveyor. The district council were then the owners of the land, and so entitled to the benefit of the restriction :—

HELD : (i) clause 5 of the original contract was applicable to the second contract made by the exercise of the option, and, therefore, in order to make a good title pursuant to the contract, it was the duty of the vendors to procure the release required by the purchaser.

(ii) as the planning scheme had not become effective, there was nothing in law which prevented the building of flats, provided that the release was procured. The defect was, therefore, one capable of remedy within a reasonable time, and the purchaser was not entitled to an order for rescission.

[**EDITORIAL NOTE.** A planning scheme does not become effective until it is confirmed by the Minister, and it would seem from the decision herein that the fact that an inchoate scheme is in existence will not affect an undertaking to obtain a modification of restrictions upon property contracted to be sold.

AS TO VENDOR'S TITLE AS AFFECTED BY RESTRICTIVE COVENANTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 259, 260, para. 344 ; and FOR CASES, see Digest, Vol. 40, pp. 144-148, Nos. 1140-1178.]

Cases referred to :

(1) *Halkett* v. *Dudley* (*Earl*), [1907] 1 Ch. 590 ; 42 Digest 441, *123* ; 76 L.J.Ch. 330 ; 96 L.T. 539.

(2) *Coffin* v. *Cooper* (1807), 14 Ves. 205 ; 40 Digest 248, *2162*.

APPEAL by the defendant from an order of BENNETT, J., dated June 27, 1940. The facts are fully set out in the judgment of SCOTT, L.J.

C. E. Harman, K.C., and *Donald Cohen* for the appellants.

H. B. Vaisey, K.C., and *A. C. Nesbitt* for the respondent.

SCOTT, L.J. : This is an appeal from a decision of BENNETT, J., by a party who was the purchaser under a contract of sale of certain land in the neighbourhood of Slough. It arose upon a summons taken out by the purchaser after an order for specific performance made by BENNETT, J., in an action brought by the other party to the contract, the vendor, in which there was the usual order by the judge for an inquiry as to title. The summons was one asking for a declaration that the plaintiff vendor had failed to make a good title in answer to a particular requisition. The requisition arose out of a particular clause in the contract of sale, and it makes it necessary to refer to its terms. There were two contracts with which the parties were concerned, one being a contract dated Sept. 24, 1937. That was a contract primarily for the sale of a plot of land close to the Great Western Railway, in the neighbourhood of Slough, delineated on the plan attached to the contract, and there coloured green. Clause 5 of the contract provided as follows:

> The conveyance to the purchaser of the property shall be subject to all the restrictions covenants and conditions contained in the conveyance thereof to the vendor dated Mar. 1, 1928, so far as the same are subsisting and capable of taking effect provided that this contract is conditional upon the vendors obtaining at their own expense a licence varying the restrictions of user of the property so as to enable the purchaser to erect a suitable block or blocks of flats upon the property in accordance with a plan thereof to be supplied by the purchaser at his own expense before the vendors apply for the said licence.

The contract for the plot then in question, shown upon the plan which was there coloured green, was duly carried out and the conveyance executed, and nothing turns on that, except that cl. 15 of that contract was as follows:

> The purchaser shall have an option to purchase all that piece or parcel of land situate in the urban district of Slough containing by admeasurement 3·98 acres or thereabouts which is more particularly delineated on the said plan annexed hereto and thereon coloured pink at the price of £300 per acre on the terms and conditions of this agreement so far as applicable thereto.

On Sept. 20, 1938, the purchaser, by a letter from his solicitors addressed to the plaintiff company, the vendors, exercised that option. The vendors contended that the clause under which they undertook to obtain a licence varying the restrictions upon the property so as to enable a block of flats to be erected did not apply at all, and, further, that, by reason of new circumstances, it had ceased to be applicable. In consequence, a dispute arose, and the vendors claimed to have the contract made by the acceptance of the offer contained in the original contract specifically performed, and issued a writ on Dec. 14, 1938. As I have said, an order was duly made in that action for specific performance on grounds which I will deal with presently. In the meantime, subsequent to Dec. 24, 1937, the date of the original contract, a planning resolution under the Town and Country Planning Act, 1932, had been passed by a regional planning committee, under which the land coloured pink on the plan was to be kept permanently as an open space. I will revert to the question of how far the resolution had that effect, but the purchaser, having had notice from the vendors of the planning resolution, which had been passed locally, objected to carrying out the contract. Hence the issuing of the writ by the vendors.

On Dec. 12, the purchaser's solicitors wrote a letter raising the question of the release of the restrictions in relation to the requisitions. That makes it necessary to refer, at this point, to the requisitions. No. 22 was as follows:

> A deed of release in a form approved by the purchaser's solicitors, granted by the persons for whose benefit the covenants relating to user of the land were inserted, waiving these covenants to enable the purchaser to erect blocks of flats in accordance with the contract must be handed over on completion.

If cl. 15 of the original contract was applicable to the new contract made by the letter of Sept. 20, 1938, that was a proper requisition, and, unless the vendor could comply with it, he could not make a good title for the purpose of the contract. The answer was as follows:

> In view of the adoption by the Slough Borough Council of the scheme under the Town and Country Planning Act, 1932, as mentioned in the pleadings in the action of the vendor against the purchaser—the clause in the contract relating to the modification of the restriction as to user is not applicable to this purchase. The purchaser must make his own arrangements with the borough surveyor to whom we understand proposals have been submitted by him for the erection of flats. The borough council are the interim development authority and they act in consultation with the South Bucks Joint Planning Committee which is preparing the scheme. The decision of the council will we are informed be formally notified in accordance with the provisions of the Town Planning Acts. The council are also now the owners of the land on the Baylis Court Estate in whose favour the restrictive covenants were imposed.

Those requisitions were dated Dec. 5, 1939, and the answers were dated Dec. 11, 1939. Upon that, the purchaser, after further correspondence, took out a summons asking for a declaration that:

> . . . owing to the failure of the plaintiffs to comply with the conditions mentioned in cl. 5 he is no longer bound by the contract.

The question before us is primarily as to whether, in answer to that summons, the purchaser is entitled to a declaration that, unless the vendors are in a position to make good the term of cl. 5 of the original contract incorporated in the contract for the pink land, the vendors are in a position of inability to make a good title.

The first question to decide, before I refer to the further history of the matter, is the question of the construction of the clause in the contract containing the option. In my view, cl. 5, under which the vendors give an unqualified undertaking to obtain a licence enabling the purchaser to erect a suitable block of flats upon the land, is clearly applicable to the second contract made by the letter of Dec. 20, 1938, upon the terms contained in the original contract. The only doubt which could possibly arise is whether that clause is "applicable to the new contract," the words at the end of the option clause, cl. 15, being "the terms and conditions of this agreement so far as applicable thereto." In my opinion, cl. 5, relating to restrictions, was a vital clause, not only applicable, but necessarily applicable, and of vital importance to the purchaser. Therefore, I have come to the conclusion, quite clearly, that the purchaser was right in saying that it was the duty of the vendors, in order to make a good title pursuant to the contract, to procure the licence in accordance with cl. 5 of the original written contract.

That does not quite dispose of the matter. Counsel for the purchaser contended that, in the circumstances, although the matter of making good a title was, so to speak, in the hands of the court, yet the unwillingness of the vendors to procure a licence, and, indeed, their actual refusal to do so, amounted to a repudiation of their contract which entitled the purchaser to a final order under his summons, releasing him from further obligation to carry out the order of the court made in the specific performance action. That raises the grounds, to a certain extent, which were taken by the defence before BENNETT, J., when he made the order in question. There was no transcript of his judgment, but we were furnished with a note, made by the two juniors concerned on each side, which enables one to appreciate what his reasons were. The judge said this :

> There was lengthy correspondence down to Jan., 1940, in which the plaintiff insisted that cl. 5 was, in the circumstances, not applicable to the contract now in question.

He then expressed his opinion that that point was a good one, and added :

> It is manifest that not all the provisions affecting the green land [the land under the first contract] would or might apply to the pink land. They were only to be applied "so far as applicable thereto." On his own evidence, before he exercised his option the scheme had come into force, and the land could not be built upon. What is the use of the provisions of cl. 5 when he knows the land cannot be built upon ? It would be perfectly idle to call upon the plaintiff to obtain the licence in those circumstances, and cl. 5 has become inapplicable.

The judge therefore refused the declaration asked for by the summons. In my view, as I have already said, the clause was quite clearly applicable, and I cannot agree with the judge's view upon that issue.

In regard to the judge's further point that the applicability of the clause had ceased by reason of new circumstances—namely, the passing of a town and country planning scheme under the Act—even if the scheme itself had been, as the judge supposed in his judgment, actually passed so as to become binding in law, in my opinion, that would not have been a sufficient answer to the requisition, because the purchaser was entitled as of right to have his land freed from the restriction of the covenant. Whether thereafter he would find some means of getting leave from the responsible authority to build is impossible to conjecture. By responsible authority, I mean the responsible authority within the meaning of the Town and Country Planning Act, 1932, the authority which has the responsibility for carrying out a scheme when it has been approved by the Minister and submitted to Parliament, and thereupon converted into law, and also in the interim period in regard to proceedings before the date when the scheme is finally passed. In fact, in this case, the judge was in error in saying that the scheme had been passed. All that had happened was that a resolution had been passed by the joint planning committee, of which the town council of Slough was a member. I gather—this is merely a matter of inference—that the joint committee had been concerned in the ultimate framing of the scheme, and perhaps had proceeded subsequently as an advisory committee, but the responsible authorities for the carrying out of the scheme, and for interim proceedings, were evidently not the joint committee, but the constituent local authorities. In my opinion, there was no ground at all for saying that anything had happened to make it impossible by any compulsion of law for the vendor to carry out his contract. I arrive at the final conclusion that the judge's judgment was wrong upon that matter. The question as to what order we should make, in view of those circumstances, is a different question. Counsel for the appellants has contended that we should make an order which, in effect, would end the matter, and operate as a rescission of the order for specific performance. I am not satisfied that that would be right. At first, counsel for the appellants did contend that the action of the vendors in refusing definitely amounted to a repudiation of all obligations under the contract, even after the order for its specific performance, and that, secondly, it was open to the purchaser to accept that repudiation, and thereupon to rescind the contract. In my view, that contention is wrong, and I think that, in the end, counsel for the appellants was not prepared to maintain that submission. However, that does not end the matter with which we have to deal. He submitted that he should have a final declaration of the failure by the vendor to make good that requisition. Again, I think that that is putting his rights too high. He referred us to *Halkett* v. *Dudley* (*Earl*) (1), which came before PARKER, J., and particularly to a passage at p. 601. The headnote in that case is as follows:

> A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title. After a decree for specific performance has been made the purchaser cannot repudiate the contract without the leave of the court.

Then PARKER, J., said, at p. 601:

> The proper course for the purchaser, on discovery of a defect of title such as might, but for the decree, give rise to a right of repudiation, is to move to be discharged from the contract. Even if he does so move I do not think he would be entitled to be discharged as a matter of course. A decree for specific performance enures for the benefit of both parties, and on the reference as to title a vendor is not confined to showing such title as he had at the date of the decree, much less to such title as he had at the date of the contract, but may perfect his title at any time before certificate. On the other hand, the purchaser is not confined to objections taken by him before or at the hearing.

Later, he said, at p. 602:

> Then there was also the case of *Coffin* v. *Cooper* (2), the headnote of which is this: "Purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which the vendor will be put under terms."

Applying those principles here, I think that the proper order for the court to make is that the answer to the requisition is not sufficient, but that, if within a limited time a licence in accordance with the clause of the agreement as contained in the original agreement of Sept. 24, 1937, is obtained by the vendor in accordance with its terms, then the inquiry as to title can be carried out, the effect of a satisfactory answer on that requisition not in any way prejudicing the purchaser's rights in regard to all the other requisitions. The appeal must be allowed.

CLAUSON, L.J.: I agree with SCOTT, L.J., that the appeal must succeed. As we are differing from the judgment of BENNETT, J., I should like to express in a few words where I find myself unable to agree with him. In the first place, the agreement which we have to construe is the agreement of Sept. 24, 1937. That is not the contract of which specific performance has been ordered. Specific performance has been ordered of the contract arising from the exercise of an option granted by the agreement of Sept. 24, 1937. Taking the agreement of Sept. 24, 1937, I confess that it seems to me most difficult to understand how it can be suggested that the provision in cl. 5 relating to conveyance free from restrictions can be otherwise than applicable to the agreement which it is contemplated will come into operation when the option is exercised in regard to the further piece of land which is subject to the same restrictions. It seems to me to be perfectly clear, on the construction of that agreement, that the agreement arising from the exercise of the option must be taken to have comprised in it the provisions of cl. 5 of the original agreement. The judge seems to have taken the view that, before the option was exercised, it had become impossible to build flats upon this particular piece of land by reason of the provisions of the Town Planning Act. There must have been some misunderstanding in the course of the argument in the court below, because, when one goes into the matter, it is perfectly clear that that is not the position at all. The position now is that there is a possibility that it will become unlawful to build flats upon this piece of land, and, having regard to the fact that the procedure under the Town Planning Act has been started, anybody who builds flats upon this piece of land will take the risk of having to pull them down without compensation if the proposed town-planning scheme ultimately becomes a binding scheme. However, that is quite a different position from that which was envisaged, as I understand the judgment of the judge.

However that may be, the point which seems to me to be of real importance is that the purchaser is entitled to object to taking the land except with a release of these restrictions. The judge seems to have thought that the release of these restrictions would not do the purchaser any good. I cannot take that view at all, having regard to the position with regard to town planning. I should have thought that it was quite obvious that a man who seeks to obtain an alteration in a town-planning scheme, in order that he may build flats upon his land is in a much stronger position for opposing the final sanction of the Minister being given to a scheme which would prevent the building of flats if, as against his neighbours, he is entitled to build flats upon his land, than a man who remains bound to some of his neighbours not to build flats on the land. It seems to me to be of vital importance to the purchaser that he should have the advantage of cl. 5, and should have the right to call upon his vendor to convey to him the land with a contemporaneous release of the restrictions.

Accordingly, I find myself, I regret to say, in complete disagreement on both points, and it appears to me that it is clearly the duty of the vendors in this case by the proper time to clear up this matter of title by obtaining the release. Since the vendors think it worth while to have another try to obtain the release, it is clear to me, for the reasons which SCOTT, L.J., has given, that we cannot deal with the matter peremptorily now and say that the vendors must be taken to have lost all opportunity of putting the matter right. The right course, in my view, is that we should declare that the purchaser is entitled to call upon the vendors to obtain such a release, and, if the vendors do not obtain such a release within due time, in the ordinary course of the proceedings in the action, the result will be that the purchaser will get an order for rescission. Of course, that is not a matter with which we should deal in our order.

LUXMOORE, L.J.: I agree that this appeal must be allowed. The contract material to be considered arises out of the exercise of an option conferred on the appellant under cl. 15 of an agreement for sale of land at Slough, dated Sept. 24, 1937. The land which was the original subject-matter of the contract is shown on the plan annexed to the contract, and is coloured green. The land which is the subject of the option is coloured pink. It is common ground that the pink land and the green land were held under the same title. The green land was on the north of a road called Woodland Avenue, and the pink land was on the south, and both parcels of land contained a total acreage of more than 15 acres, the pink land being nearly 4 acres.

It appears from the contract of Sept. 24, 1937, that the purchaser's—that is, the appellant's—object in buying the land was to erect flats on it. The vendors' title was subject, as appears from the contract, to a number of restrictions which prevented the free user of the land, and among others are the restrictions referred to in cl. 5 of the covenant, which prevents, among other things, the erection of flats on the land. That clause provides that the vendors must obtain a licence varying those restrictions so as to enable the appellant purchaser to erect flats on the land.

The first question which arises with regard to the exercise by the purchaser of the option given to him by cl. 15 with regard to the pink land is this. What are the terms and conditions of the agreement which are to be applicable to the purchase resulting from the exercise of the option? It seems to me quite plain that matters which deal with the title to the land, which is the same in each case, must be matters applicable to both parts of the land. It was argued before BENNETT, J., and I think that he accepted the argument, that the provisions relating to the licence varying the restrictions, so as to enable blocks of flats to be erected on the pink land were not applicable to the contract resulting from the exercise of the option to purchase the pink land, because the local authority, in conjunction with some other authority or authorities, had adopted a town-planning scheme under the Town and Country Planning Act, 1932, which, according to its present proposals, reserves the pink land as land upon which no buildings are to be erected.

Bennett, J., said that, in those circumstances, it was useless to get the restrictions removed, and the ground on which he based that view appears to be that the town-planning scheme was an effective scheme, and was then in full operation. I think that there can be no doubt that the judge was in error when he took that view, because the town-planning scheme is not at the present time effective as a scheme which A can be enforced in all its details. Indeed, as I understand it, it has not been submitted to the Minister for approval, and there has been no inquiry yet held with regard to it. It may well be that, when the inquiry is held, the appellant, if he completes the purchase of this land, may be able to persuade the Minister to vary the scheme by allowing B flats to be built on the pink land. If he urges that proposition before the Minister, he certainly will not be in a worse position, if he has asked for a proper release of the pink land from those restrictions which prevent flats from being built. To my mind, the existence of the restrictions and their release have no relationship to the existence of a town-planning C scheme, whether in its early stages or after the scheme has been approved by the Minister and has become law, for it is always open to a landowner whose land is affected by a town-planning scheme to apply to the Minister for its variation, and I see no reason for excluding the applicability of cl. 5 of the contract to purchase the pink land owing D to the existence of the town-planning scheme. No doubt, if the appellant completed the purchase of the pink land, and was minded to build flats upon it, he could do so without any fear at the moment of the local authority taking any step to prevent their erection, because, until the town-planning scheme becomes effective, the only sanction against E building in contravention of such a scheme is the power conferred on the local authority, if so minded, to order him to pull down the flats after the scheme has become effective. This may be a risk which the appellant is ready and willing to take, but, if he were to attempt to build flats on the pink land without obtaining the release of the relevant F restrictions, the local authority, who, I understand, are now the owners of the land which has the benefit of those restrictions, could at once obtain an injunction restraining him from building flats upon the pink land. This would be contrary to the terms of the agreement. It is for these reasons that I find myself quite unable to agree with the decision G of Bennett, J.

With regard to the argument that the appellant is entitled to have the contract rescinded, I do not think it necessary to add anything, except to say that the answer to that is to be found in the judgment of Parker, J., in *Halkett* v. *Dudley* (*Earl*) (1), to which Scott, L.J., H has already referred. I think that there should be a declaration that the answer to requisition No. 22 is insufficient, and that the Cleadon Trust, Ltd., cannot make a good title to the property in question unless and until the restrictions referred to in cl. 5 of the contract of Sept. 24, 1937, have been released to the extent mentioned in that clause, and that this declaration is without prejudice to any other question arising with regard to the title upon the inquiry as to title directed by the order of Oct. 18, 1939. I agree that the appeal must be allowed.

Appeal allowed with costs in both courts.

Solicitors: *Clutton, Moore & Lavington*, agents for *F. Miller Parris*, Croydon (for the appellants); *T. D. Jones & Co.*, agents for *Criddle, Ord & Muckle*, Newcastle-upon-Tyne (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

FATTORINI, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **July 4, 5, 8, August 2, 1940.**]

Income Tax—Undistributed income—Shares charged to bank—Covenant to pay all dividends received from shares to bank—Company having no other income—Whether reasonable portion of income not distributed—Finance Act, 1922 (c. 17), *s.* 21 (1).

A holding company owned a part of the shares of 3 operative companies—i.e., companies which actually carried on the trading with which they were all concerned. In 1936, the holding company purchased all the remaining shares in the 3 operative companies. In order to provide the purchase money, the holding company charged all the shares to the bank, and covenanted to pay to the bank all dividends received in respect of the shares so charged. The holding company contended that, as it had agreed to pay all the dividends to the bank, and as those dividends made up its whole income, it had no income to distribute. For the Revenue, it was contended that the company, having become a holding company, and having no other business, could distribute its whole income, that it had no requirements or needs falling within the proviso to the Finance Act, 1922, s. 21 (1), that the fact that it had agreed to pay the dividends, as and when received to the bank, did not, in the circumstances of the case, prevent it from declaring a dividend, and, finally, that it had not distributed a reasonable part of its income:—

HELD: the agreement with the bank did not preclude the company from paying a dividend, and, therefore, the company had not distributed a reasonable proportion of its income.

Glazed Kid, Ltd. v. *Inland Revenue Comrs.* (1) *considered.*

[EDITORIAL NOTE. The argument in this case is that, as the company had no other income than the dividends to be paid on the shares, and as these dividends had been covenanted to be paid to the bank, it had, therefore, no actual income, and it could not be said that any part of its income had not been distributed. The Court of Appeal have held, however, that it does not follow from these facts that the "actual income" of the company referred to in the Finance Act, 1922, s. 21, has been wholly applied to the payment of the interest on the bank charge, and the matter is one for an inquiry whether there has been a proper distribution of income.

AS TO COMPUTATION OF ACTUAL INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 292, 293, paras. 578, 579; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674h-674q.]

Cases referred to:

(1) *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1930), 15 Tax Cas. 445; Digest Supp.

(2) *London County Council* v. *A.-G.*, [1901] A.C. 26 ; 28 Digest 73, *392* ; 70 L.J.Q.B. 77 ; 83 L.T. 605 ; 4 Tax Cas. 265 ; *revsg.*, [1900] 1 Q.B. 192.

(3) *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (1936), 105 L.J.K.B. 236 ; Digest Supp. ; 154 L.T. 355 ; 20 Tax Cas. 48.

(4) *Carlaw (David) & Sons, Ltd.* v. *Inland Revenue Comrs.*, [1926] S.C. 870 ; Digest Supp. ; 11 Tax Cas. 96.

(5) *Colville Estate, Ltd.* v. *Inland Revenue Comrs.*, [1930] 2 K.B. 393 ; Digest Supp. ; 100 L.J.K.B. 101 ; 144 L.T. 28 ; 15 Tax Cas. 485.

(6) *Inland Revenue Comrs.* v. *Marbob, Ltd.*, [1939] 2 K.B. 872 ; [1939] 3 All E.R. 309 ; Digest Supp.

(7) *Carnarvon Estates Co.* v. *Inland Revenue Comrs.* (1935), 19 Tax Cas. 643 ; Digest Supp.

Appeal by the Inland Revenue Commissioners from an order of Macnaghten, J., dated May 9, 1940. The facts are fully set out in the judgment of Scott, L.J.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., and *T. N. Donovan* for the respondents.

The Attorney-General : The reason given for not distributing the profits as dividends was that the company had agreed to pay them to the bank in repayment of a loan with which the company had used to buy further investments. The Crown says that that is no answer. It would be an extraordinary way of getting round the section if people could say that they had agreed to use the profits of a particular year to increase their investments. It is not an answer to say that the court cannot look behind the agreement. The court can go into the circumstances : *Carlaw (David) & Sons, Ltd.* v. *Inland Revenue Comrs.* (4). The fact that money is spent upon a new capital asset does not preclude the payment of a dividend. In *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (3), there was an expenditure upon capital assets of a sum exceeding the profits. It was held that no distinction could be drawn in cases where there was a contract to pay. In the court below, great reliance was placed upon *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1). The principle upon which this case was decided was overruled in *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (3).

Hills : The Finance Act, 1922, s. 21, deals with the case where a reasonable dividend has not been declared. The section would be rendered ineffectual if, instead of waiting until the dividends were payable, it were possible to decide at the beginning of the year how they should be dealt with.

Tucker, K.C. : The company had no income except what it received from dividends. It carried on no other business. The decision in *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1) was right, and, since that case, legislation on this subject has proceeded on the footing that it was right. *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1) has not been overruled by *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (3). *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1) has stood for

10 years unchallenged until now, and the decision is right. In *Colville Estate, Ltd.* v. *Inland Revenue Comrs.* (5), Rowlatt, J., said that, if there was a contract by a company with somebody outside under which the company was not to distribute its income, the company could not be said not to distribute that which it was not free to distribute. It would have been a breach of contract for the company to have distributed the dividends in any way except by paying them over to the bank. The fact that the Finance Act, 1939, altered the law shows quite clearly that it was not the law in the earlier years. The law presupposed that a company might be applying its income for capital purposes, and condoned this. Even if the purchase of the shares is not covered by one of the three expressions in the Finance Act, 1922, s. 21, nevertheless there was no income for distribution. Alternatively, if it is necessary to point to either a current or a future requirement, the company had a current requirement. [Counsel referred to *Inland Revenue Comrs.* v. *Marbob, Ltd.* (6).]

Donovan, following, referred to *Carnarvon Estates Co.* v. *Inland Revenue Comrs.* (7).

Scott, L.J.: This appeal raises a question of the application of the Finance Act, 1922, s. 21, to the respondent company, which we shall call the company. The Special Commissioners, acting under that section, by notice in writing to the company directed that, for purposes of assessment to sur-tax, the income of the company for the years 1936-37 and 1937-38 should be deemed to be the income of the members. The company appealed to the Special Commissioners acting in their judicial capacity, who discharged the direction. The Inland Revenue Commissioners then appealed to the Board of Referees, who allowed the appeal and stated a case for the High Court. Macnaghten, J., reversed that decision and restored the decision of the Special Commissioners discharging the original decision. The present appeal is from his decision. The facts found by the Board of Referees can be stated shortly.

The company was incorporated in 1919 as a private company with wide powers, *inter alia*, to take over a profitable business in jewellery over the counter and by mail orders conducted by Thomas Fattorini whose name the company bears. This it conducted till 1928, when it discontinued the former part of the business and sold the latter to a company called Thomas Fattorini (Skipton), Ltd., for £14,000. This company was one of 3 private companies which the Special Commissioners call the operative companies, in contradistinction to the company which thus ceased to operate. It, too, dated from 1919, and carried on the same two types of business as the company had conducted. The second operative company was Thomas Fattorini, Ltd., also incorporated in 1919. It carried on at Birmingham the same two types of business. The third was called H. Pearson, Ltd., incorporated in 1915. Its business was originally that of cycle dealers, but in 1924, when Thomas Fattorini acquired its share control, the cycle business was dropped, and thenceforth it carried on a mail-order business at Manchester.

Thomas Fattorini died in 1934, then owning 10,100 ordinary shares in the company and, apparently, practically all the shares in the 3 operative companies. He left two sons, Frank and Wilfred, and by his will gave them an option to buy his shares in the company. In Apr., 1936, the company agreed to buy all Frank's shares in the 3 operative companies for £18,229, paid for them out of its own resources, and became the registered holder in Aug., 1936. As Frank did not want to buy his father's shares in the company, Wilfrid did so, and on Sept. 17, 1936, he was duly registered as the holder of the 10,100 shares. On Sept. 23, 1936, the company acquired all the remaining shares in the 3 operative companies then held by either the executors of Thomas Fattorini or Wilfrid for £121,229. In order to provide the necessary money, it had entered into an agreement with Martins Bank by which that bank agreed to advance up to a maximum of £108,000 on deposit by way of charge of the shares then to be bought, and also the shares previously bought from Frank, and, in consideration of a covenant by the company, to pay to the bank all the dividends as and when received by the company, not only on the shares then to be purchased, but also on the shares to the value of £18,229 already bought from Frank and paid for by the company, and of a personal guarantee of the overdraft by Wilfred. The mortgage of the shares necessarily carried with it a charge upon the dividends, and we are not satisfied that the covenant to pay the dividends gave the bank any further right than they necessarily obtained as mortgagees. The amount in fact so borrowed from the bank was £103,908, or £17,321 less than the purchase price.

It was contended for the company that its "actual income" (within the meaning of sect. 21) for the two years in question consisted solely of the dividends receivable on the whole of the shares in the 3 operative companies, and that, in the circumstances, the actual income and the dividends in fact meant the same thing, so that apparently the company had contracted itself out of the whole of its "actual income." However, that statement of the position is only a half-truth. The dividends, no doubt, constituted the company's gross receipts, but not its "income" for income-tax purposes. The interest paid to the bank, for instance, had to be deducted from the gross receipts. However, if on the contention it was intended to base an inference of fact that the company possessed no assets out of which it could raise money, to take the place of income which it had found it convenient to devote to a capital purpose, with a view to a declaration of dividend, the facts do not support the inference. The bank had advanced the £103,908, but the company had found the balance of £17,321, and also the whole price of £18,229 paid for the shares previously bought from Frank Fattorini, the bank thus providing roughly three-quarters and the company out of its own resources one-quarter of the cost of the totality of shares charged to the bank. The company did not pay or declare any dividend of its own in respect of either of the years in question, and has contended throughout that, as it had agreed to pay all the dividends to the bank, and as those dividends made up its whole income, it had no income to distribute, and it relied on the decision of ROWLATT, J., in *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1). The commissioners contended that the company, having become a mere holding company, and having no other business, should distribute its whole income, that it had no requirements or needs falling within the proviso to sect. 21 (1), that the fact that it had used the dividends, as and when received, to pay into the bank did not, in the circumstances of the case, prevent it from declaring a dividend, and, finally, that it had not distributed a reasonable part of its income. The findings of the Board of Referees were as follows:

> 23. We, the members of the board, sitting to re-hear the appeal, hold as a matter of construction of the contract with Martins Bank that it would not have been a breach of contract for the company to distribute a dividend, and we found, as a fact, that if we were wrong on this point and a distribution of a dividend would have been a breach of contract, it was not reasonable for the company to make such a contract. We hold that *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1) was distinguishable, as it was assumed in the judgment in that case that the distribution of a dividend could only have been made if moneys payable to the bank had been retained, a course which would have been restrained by injunction, and there appeared to be no argument that the contract was not a reasonable contract. 24. We considered that, as the company was an investment company which after Aug. 24, 1936, held investments producing revenue for which the company had paid £18,000, there was a *prima facie* case that the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend, and that the company had not displaced such *prima facie* case by evidence that this could not have been done without jeopardising the interests of the company, or without making it impossible to acquire the shares which it desired to buy. 25. We found as a fact that the company had not, within a reasonable time, distributed in the manner referred to in the Finance Act, 1922, s. 21, a reasonable part of its income for either of the periods in question.

The finding in the first part of para. 23 that it was "not reasonable to make such a contract" is, in our view, an irrelevant observation, and constitutes no valid ground for distinguishing the *Glazed Kid* case (1). Sect. 21 does not control the manner in which the company shall conduct its business. It is paras. 24 and 25 which contain the crucial findings of fact. In our opinion, it is impossible to say that there was no evidence to support them, particularly para. 25, and that is sufficient reason for allowing the appeal.

The audited accounts of the company, marked F.1, F.2, and G., are annexed to, and form part of, the case, and the position they disclose throws material light on this issue. The company's year used to run to Feb. 7, and F.1 is the account for the year ending Feb., 1935. F.2 is for a longer period—namely, from Feb., 1935, to Sept. 30, 1936, Wilfred Fattorini having, no doubt on his acquisition of control, changed the date to suit his plan to meet the Finance Act, 1922, s. 21. It shows £1,965 profit carried forward from F.1, and shows that the issued capital was raised during that period from 10,500 to 15,000 £1 ordinary shares fully paid, and from 1,500 to 1,765 £1 preference shares fully paid, so that the company received, presumably, £4,500 plus £265 in cash. It also shows the then bank overdraft at £103,994. G. shows for the changed company year ending Sept. 30, 1937, £1,675 profit carried forward from F.2, and a net balance of profit, after deducting bank interest and so on from dividends and preference interest received on certain shares of £25,227, and investments, consisting of the shares of the 3 operative companies as in F.2, at £122,435. It also shows an important change. The bank overdraft is reduced to £80,442.

It is to be observed that the 44,980 ordinaries in Thomas Fattorini (Skipton), Ltd., were bought at a premium of about 40 per cent., the 24,980 ordinaries in H. Pearson, Ltd., at a premium of about 90 per cent., and the 13,480 ordinaries in Thomas Fattorini at a discount of about 25 per cent. They were businesses of many years' standing, and were apparently prosperous commercial concerns. If so, further money could easily be raised on their shares. It seems to us obvious that, in the absence of any evidence proving inability on the part of the company to borrow enough either to release some of the dividend income, or (those specific receipts of cash having been put out of reach) to obtain enough money by other means to distribute a reasonable dividend, the finding in para. 25 of the case must stand. It cannot possibly be said that there was no evidence to support it. The onus of proof was on the company, and they made no attempt to prove that there was any over-valuation of the shares, either on the purchase or as appearing in the two balance sheets, or that the operative companies were likely to make losses, or even were not prospering. Nor did they make any other attempt to show that they could not declare a dividend. They left the facts alone, but relied, before the Board of Referees, on a rule of law which, they contended, had been laid down by ROWLATT, J., in the *Glazed Kid* case (1). It was not unnatural for the company to rely in argument on that case, as in the present case the whole plan for protecting its two shareholders from liability to sur-tax was in form a replica of the plan in that case. ROWLATT, J., there seems to have held that the *de facto* appropriation of the specific dividends to the performance of the bank agreement, pursuant to a legal obligation, used up "the actual income" of the company for good and all, and made it impossible, in law, to hold that thereafter the company had any income left to distribute.

In the present case, MACNAGHTEN, J., agreed with and followed the view of ROWLATT, J., adding that in any event he would be bound by that decision. However, certain reasons he gave were wrong, even if the decision in the *Glazed Kid* case (1) bound him. He says in his penultimate paragraph:

> The decision of the Board that, as a matter of construction, the agreement of Sept. 22, 1936, does not forbid the company to pay a dividend is an academic

> question, in view of the fact that the agreement is so drawn as to preclude the company from doing so. The case states that the income derived from these shares in the operative companies was the only source of income that the respondent company had. . . . Since the respondent company has no assets except these shares, it would have been impossible for the company to obtain from any source money with which to pay any dividend to its shareholders.

Our reasons are these. ROWLATT, J., attached to the expression "actual income" a meaning with which we disagree. He treated it as connoting the receipts side only of the income account. He assumed that, if the actual receipts in the statutory year mentioned in sect. 21 had been assigned or hypothecated under a binding contract, the company's "actual income" had passed out of its control, and, therefore, ceased to be available for distribution. This, in our opinion, is an error. The true meaning of the phrase, we think, is indicated by the context, and by certain provisions of the Act of 1918. As was said by LORD MACNAGHTEN in *London County Council* v. *A.-G.* (2), at pp. 35, 36:

> Income tax . . . is a tax on income . . . whatever may be the standard by which the income is measured.

The phrase "profits and gains" in income-tax legislation is—at any rate, under Sched. D—no more than a synonym for "income." For purposes of assessment, the income of an anterior period was, and is, "deemed to be the income" of the person charged for the year of assessment. He is charged on a conventional or putative, and not on the actual, income. Until 1927, it was an average of 3 years. Since then, it has been the income of the preceding year. In the case of supertax, also, the "total income" was to be ascertained on the previous year's basis (sect. 5 (1)), and, where tax had been deducted at the source, the income of the previous year before deduction was "to be deemed to be income of the year in which it was receivable" (sect. 5 (3) (*c*)). Finally, Sched. D, Cases I and II, r. 8, reproducing the Finance Act, 1907, s. 24, but repealed by the Finance Act, 1926, provided that, where:

> . . . the *actual* profits or gains [the income] . . . in the year of assessment fall short of the profits or gains as computed in accordance with this Act, he shall be entitled to be charged on the *actual* amount of the profits or gains so arising, instead of on the amount of the profits or gains so computed . . .

That rule in the Act of 1918, we think, supplies the key to the meaning of the word "actual" in sect. 21 of the Act of 1922, which called for interpretation in the *Glazed Kid* case (1), and calls for it in the present case. It was inserted to make it clear that it is not the conventional income, but the *de facto* income of the year in question which is subject to the duty to distribute. The epithet "actual" in such a sense is illustrated in income-tax law by the Finance Act, 1907, s. 24 (2), (3), where the successor to a continuing business, and his predecessor, who ceases to carry it on, are taxed on their "actual income" in the two broken periods of the year. The fact that the word is used in that sense in income-tax legislation still in force in 1922 seems to us conclusive.

It is not true to say, as the judge below said, that the bank agreement precluded the company from paying a dividend. As I have pointed out, even the fact that the charged shares were the company's only asset would not have prevented them. If the judge regarded those two considerations as obstacles not in law but in fact, that question was for the Board of Referees, and not for him, and his view is inconsistent with the finding in para. 25 of the case. If the judge regarded them as obstacles in law, we do not agree with him. There is nothing in law to prevent a company using an income receipt as cash in its hands to discharge a capital liability, and then, after the close of its financial year, using a general credit balance, or even borrowing, to restore the profit-and-loss position for the purpose of dividend. Indeed, we think that the judgment of Romer, L.J., in *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (3) expresses this view, at pp. 70, 71 :

> The case of the appellant company is this : they say that during the financial year which is in question in the case they spent out of income a sum largely in excess of the net profits that they earned by their trading during that year, and that therefore the commissioners had no right to give any such direction as they purported to give under sect. 21 (1) in relation to that income. In other words, the income having been spent upon current requirements of the company's business—requirements that were necessary or advisable for the maintenance and development of that business—it is taken for ever out of the operation of the subsection, and no direction could thenceforward be given by the commissioners in relation to it. I disagreee with the premises, and, if the premises could be accepted, I disagree with the result that is said to flow from them. . . . At most, it can be said that the money has been temporarily taken out of revenue, and it is for the directors to determine, at the time when they have to consider the question of what they will do with their profits, whether the sum so temporarily taken out of revenue is to be permanently allocated to revenue so as to capitalise the payments—that part of the revenue—or is to be taken out of capital assets.

In that case, Lord Hailsham, L.C., and Lord Russell of Killowen both expressed approval of the judgment of Romer, L.J.

There are certain differences between the present case and the *Glazed Kid* case (1), but we are not satisfied that they are sufficient to leave that decision uncriticised, and, so far as it may be inconsistent with the principles we have expressed, we cannot agree with it. The judgment of the court is, therefore, that the appeal must be allowed, with costs here and below, and that the second question must be answered in the affirmative. It is unnecessary to answer the other two questions.

Clauson, L.J. : I agree, and I have nothing to add.

Goddard, L.J. : I agree.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors : *Biddle, Thorne, Welsford & Gait*, agents for *Charlesworth, Wood & Brown*, Skipton (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re LONDON HOUSING SOCIETY, LTD.'S, TRUST DEEDS. MORELAND *v.* WOODWARD.

[CHANCERY DIVISION (Farwell, J.), **June 12, 1940.]**

Industrial and Provident Societies—Conversion of registered society into company—Trust deeds establishing pension fund for benefit of employees of society—Whether trust deeds affected by conversion—Industrial and Provident Societies Act, 1893 (*c.* 39), *s.* 54.

A society registered under the Industrial and Provident Societies Act, 1893, entered into trust deeds, whereby certain sums were transferred to trustees for the establishment of a pension fund for the benefit of employees past and present. Subsequently the society was converted into a limited company in pursuance of sect. 54 of the Act :—

HELD : the society and the company were in substance the same thing and the trustees held the trust funds in their hands on exactly the same trusts as they had held them before the conversion.

[**EDITORIAL NOTE.** The legislature, in providing for the conversion of a registered society into a company, did not intend to treat the society as having ceased to exist for all purposes, as is shown by the provision in sect. 54 (3) that claims subsisting against the society at the time of the conversion are not to be affected, but are to have priority as against the property of the company over all other rights or claims against, or liabilities of, the company. Although the society and the company are, strictly speaking, separate legal entities, they are in substance the same thing, and, in consequence, trust deeds establishing a pension for employees of the society are unaffected by the subsequent conversion of the society into a limited company.

AS TO CONVERSION OF REGISTERED SOCIETY INTO COMPANY, see HALSBURY, Hailsham Edn., Vol. 17, p. 497, paras. 1082, 1083 ; and FOR CASE, see DIGEST, Vol. 28, p. 127, No. 73.]

Case referred to :

(1) ***Blythe* v. *Birtley*, [1910] 1 Ch. 228 ; 25 Digest 337, *386* ; 79 L.J.Ch. 315 ; 101 L.T. 842.**

SUMMONS by the trustees of a pension fund for the benefit of employees of the London Housing Society, Ltd., to determine whether, on the conversion of the society to a limited liability company, the funds vested in them were still held on the same trusts as before the conversion on the footing that the company should be treated as being the same legal entity as the society had been before the conversion. The London Housing Society, Ltd., was registered under the Industrial and Provident Societies Act, 1893, on June 7, 1910. A trust deed, dated Apr. 12, 1935, for the purpose of creating a staff pension fund, was made between the society of the one part and certain persons as trustees of the other part. The deed recites, *inter alia,* that the society has power under its rules to apply the net profits of its business towards the establishment of a staff pension fund. Clause 1 defines the expressions " the trustees " and " the fund." Clause 2 provides as follows :

> The fund shall consist, in the first instance, of the investments and cash specified in the schedule hereto, and there shall be added to it all contributions made by the society under the hereinbefore recited power, or any other power in its rules and all contributions or donations thereto made by any other person or persons and any sums so contributed shall be paid forthwith to the trustees upon the trusts hereof.

Clause 3 provides for the investment of the moneys in the hands of the trustees. Clauses 4, 5 and 11 provide as follows:

> 4. The fund is to be regarded as primarily established for the benefit of past, present and future employees of the society whose character and length of service may in the judgment of the trustees entitle them to a claim on it, and, secondly, for the purpose of assisting survivors who may have been dependent on deceased employees and whose circumstances may necessitate some help.
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> 5. The fund shall be applied by the trustees in making such payments whether out of income or capital, to or for the benefit of past, present or future employees of the society and their dependents as the trustees shall in their unfettered discretion think fit, but without prejudice to such discretion it is not contemplated that except in cases of ill-health or other special circumstances any payment shall be made out of the fund to or for the benefit of an employee who is not 60 years of age and has not completed 10 years service with the society.
>
> 11. If the society shall at any time give to the trustees notice in writing that the society does not intend to make any further contributions to the fund or an order shall be made or any effective resolution passed for the dissolution of the society, the fund shall be realised and shall be distributed amongst such of the then employees of the society and such past employees and such dependents of past employees and in such proportions as shall be determined to be just and equitable by an arbitrator to be appointed by an unanimous resolution of the trustees, and if such appointment is not made within 3 months after the giving of such notice or the making or passing of such order or resolution as aforesaid, then the majority of the trustees may request the President for the time being of the Law Society to appoint him accordingly.

On Oct. 25, and Nov. 15, 1939, the society passed a resolution, in pursuance of the Industrial and Provident Societies Act, 1893, s. 54, that it should be converted into a limited liability company, and on Dec. 30, 1939, it was registered as a company limited by shares, and now carries on business in place of, and takes the position of, the original London Housing Society. The Industrial and Provident Societies Act, 1893, s. 54, is as follows:

> (1) A registered society may by special resolution determine to convert itself into a company under the Companies Acts, or to amalgamate with or transfer its engagements to any such company. (2) If a special resolution for converting a registered society into a company contains the particulars by the Companies Acts required to be contained in the memorandum of association of a company, and a copy thereof has been registered at the central office, a copy of such resolution under the seal or stamp of the central office shall have the same effect as a memorandum of association duly signed and attested under the said Act. (3) If a registered society is registered as, or amalgamates with, or transfers all its engagements to, a company, the registry of such society under this Act shall thereupon become void, and the same shall be cancelled by the Chief Registrar or by the Assistant Registrar for Scotland or Ireland under his direction; but the registration of a society as a company shall not affect any right or claim for the time being subsisting against such society, or any penalty for the time being incurred by such society; and, for the purpose of enforcing any such right, claim, or penalty, the society may be sued and proceeded against in the same manner as if it had not become registered as a company; and every such right or claim, or the liability to such penalty, shall have priority, as against the property of such company, over all other rights or claims against or liabilities of such company.

P. J. Sykes for the trustees.

J. G. Mavrogordato for a defendant, representing the employees generally.

Farwell, J.: I think it clear from sect. 54 of the Industrial and Provident Societies Act, 1893, that an industrial society is entitled to convert itself into a company under the Companies Act, and, if it takes the necessary steps to effect that object, the position is that the society, as an industrial society, is removed from the register, and thereby ceases to be a registered society. However, the latter part of subsect. 3 clearly recognises that the society is still something which is in existence, because there is the express provision that the registration of the company shall not affect any rights or claims against the society. That provision is for the purposes of enabling people to recover moneys owing to them by the society or penalties which have been incurred by the society as a society. The Act provides that such persons have the right to sue and recover moneys due, notwithstanding that the society has changed from an industrial society to a company.

The only other section of the Act to which I need refer is sect. 58, which is in a very different form from, and has no express relation to, sect. 54. It provides for the ways in which a registered society may be dissolved; first, by an order to wind up, or a resolution for winding up; secondly, by the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution. So far as the dissolution of the society is concerned, it is a totally different process, which requires different machinery to bring it about from the conversion of a registered society into a company, which is provided for by sect. 54.

In these circumstances the trustees of the trust deed feel a doubt. Under the deed they hold the funds upon trust to apply them, as provided by the deed itself, for the benefit of certain persons who were employees of the registered society. Now, as the position is at this moment, the persons who were intended to be the beneficiaries under the trust deed are not employees of the registered society, but of the company into which the society has been converted. Not unnaturally, the trustees feel apprehensive if and when they are asked, or desire, to pay pensions or make other applications of the fund to persons who were employees of the society, but are not so employed any longer. The difficulty is an acute one because there are certain pensions which have been paid for some time to persons who were in need, being employees or ex-employees of the society, and it would be disastrous in many cases if these payments had to cease. The trustees are, however, anxious to do nothing which would be a breach of trust, and desire to know how they should act in the circumstances.

In my judgment, nothing has been done which brings into play, according to its terms, the provisions of cl. 11 of the trust deed. There has been no notice given by the society such as is contemplated in the first part of the clause, nor has there been an effective resolution passed for the dissolution of the society. What has been done has not been something under sect. 58, the dissolution section, but under sect. 54, which is not a dissolution section, but is a section which enables a friendly society to go through a form of conversion and to come out at the end a limited liability company. However, the liabilities which the registered society may have incurred before the conversion takes place are not to be prejudiced by that conversion. The society is to remain liable for those liabilities, and such claims are to have priority as against the property of the company over all other rights or claims against or liabilities of the company. It is, therefore, quite clear that the legislature, in passing this legislation, providing for a conversion in this way, was not treating the registered society as having determined for all purposes, but was treating the act as being, in the true sense of the word, a conversion and not a dissolution. In my judgment, there is nothing in the trust deed itself which brings to an end the trusts provided by the deed, and the trustees hold the funds, so far as the deed itself is concerned, on trust for the employees and ex-employees of the society. The question is what the trustees are to do now that the society has ceased to exist as a society, and there has come into life a company which is the society in another form. In my judgment, the trustees hold the trust funds in their hands on exactly the same trusts as they previously held them. The beneficiaries are precisely the same class of persons as the class of persons before, namely, persons who were employees or ex-employees of the society and are now employees or ex-employees of the society in its new form of a limited company. It is no doubt true to say that the registered society and the limited company, are, in one sense of the words, separate legal entities, but I do not think that that fact alters the position that, although in law they may be separate legal entities, they are in substance and in truth exactly the same thing with a different structure and a different method of machinery. I think that that is what Buckley, L.J., is referring to at the end of his judgment in *Blythe* v. *Birtley* (1), where he says, at p. 238:

> Sect. 71 simply meant to provide that they might change their legal structure, but the new entity existing under the new legal structure was to be a reproduction of the previous entity with different machinery for its government.

I think that what Buckley, L.J., is there saying is that, although in law the fact that strictly they were two legal entities may have to be recognised, the new entity under the new legal structure is a reproduction of that which existed before—namely, the society.

In my judgment, the only practical way of dealing with a question of this sort, is to treat the two things, the registered society and the limited company, as the same thing. The employees of the society are, as it were, carried on and continued in the same form as before except that the entity which employs them has a different name and a different structure from that which the society had. In truth and in substance the society and the company are the same thing, and, therefore, the trustees, if they continue to apply the trust funds for the benefit of the persons for whom they would have employed them had the society not been converted, will not be committing any breach of trust, but will in fact be carrying out the purposes of the trust. In my judgment, therefore, the trustees have now the same duties and obligations as existed before the conversion.

Solicitors: *Rooks, Wales, Godwin & Galsworthy* (for all parties).

[*Reported by* I. G. R. Moses, *Barrister-at-Law.*]

END OF VOLUME 3.